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In the Supreme Court of the United States

OCTOBER TERM, 1975

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

ROOSEVELT F. PALMORE

C. L. SWAIN, SUPERINTENDENT, LORTON REFORMATORY, PETITIONER

v.

JASPER C. PRESSLEY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Superior Court of the District of Columbia, the Attorney Gen-

eral of the United States, the Director of the District of Columbia Department of Corrections, and the Superintendent of the Lorton Reformatory,[1] petitions for writs of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit in the above-captioned cases.

OPINIONS BELOW

The opinion of the court of appeals in *Palmore* v. *Superior Court of the District of Columbia, et al.* (App. A, *infra*) is reported at 515 F.2d 1294. The district court's order in that case, discharging the rule to show cause and dismissing the petition for a writ of habeas corpus (App. C, *infra*), is unreported. The opinion of the court of appeals in *Pressley* v. *Swain* (App. D, *infra*) is reported at 515 F.2d 1290. The district court's order in that case, discharging the rule to show cause and dismissing the petition (App. F, *infra*), and its memorandum opinion (App. G, *infra*), are unreported.

[1] In *Palmore*, the Attorney General of the United States was named as a party-respondent in the petition for a writ of habeas corpus. In *Pressley*, neither the United States nor the Attorney General was named as a party. However, by long-standing agreement, when the complaint in a habeas corpus petition relates to the validity of an underlying conviction secured by the United States, the United States Attorney for the District of Columbia represents the Lorton Reformatory or the District of Columbia Department of Corrections; otherwise they are represented by the Corporation Counsel for the District of Columbia.

JURISDICTION

The *en banc* judgments of the court of appeals in *Palmore* (App. B, *infra*) and in *Pressley* (App. E, *infra*) were entered on July 9, 1975.[2] By order of October 29, 1975, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the federal district courts have jurisdiction to entertain habeas corpus petitions by persons convicted of violations of the District of Columbia Code in the Superior Court of the District of Columbia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

23 D.C. Code 110(g) provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate

[2] On November 12, 1975, the court of appeals in both cases granted motions to stay its mandates and to stay the reissuance of its judgments to and including December 6, 1975.

or ineffective to test the legality of his detention.

The comparable portion of 28 U.S.C. 2255 provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Other relevant constitutional and statutory provisions are set forth in Appendix H, *infra*.

STATEMENT

1. *Palmore* v. *Superior Court.*

After a non-jury trial in the Superior Court of the District of Columbia, respondent was convicted on March 31, 1971, of violating the felony provision of 22 D.C. Code 3204 by carrying a pistol without a license after previously having been convicted of a felony.[3] On April 27, 1971, he was sentenced to a

[3] As set out in this Court's opinion in *Palmore* v. *United States*, 411 U.S. 389, the facts giving rise to this conviction are as follows: In January of 1971, two officers of the District of Columbia Metropolitan Police Department observed a moving automobile with license tags indicating that the vehicle was rented. The officers stopped the vehicle for a spot-check of the driver's license and car-rental agreement. Respondent Palmore, the driver of the vehicle, produced a

term of imprisonment for two to six years. Execution of all but six months of the sentence was suspended, and respondent was placed on probation for six years.

Prior to trial, respondent moved to dismiss the indictment on the ground that the Superior Court lacked jurisdiction to try him for a felony, alleging that only Article III judges with life tenure and salary protection could constitutionally exercise jurisdiction over the trial of a felony based on a law passed by Congress. He also moved to suppress the pistol seized from the car he was driving when stopped by the police, on the ground that the gun was discovered as the result of an unlawful search. The motions were denied. Following an appeal based on these claims, the District of Columbia Court of Appeals affirmed respondent's conviction. *Palmore* v. *United States*, 290 A.2d 573 (D.C. App.). Respondent then appealed to this Court pursuant to 28 U.S.C. 1257(2).

This Court concluded that since the District of Columbia "is constitutionally distinct from the states" (*Palmore* v. *United States*, 411 U.S. 389, 395), an appeal could not be taken under Section 1257(2). However, the court treated Palmore's jurisdictional statement as a petition for a writ of certiorari and granted the petition, limited to the question whether

rental agreement from the glove compartment of the car and explained why the car appeared to be, but was not, overdue. Meanwhile, one of the officers observed the hammer mechanism of a gun protruding from under the armrest in the front seat of the vehicle. Respondent was thereupon arrested.

Palmore was required to be tried by a court ordained and established in accordance with Article III, Section 1, of the Constitution (411 U.S. at 396-397). On that question, the Court held that "there is no support * * * in either constitutional text or in constitutional history and practice" for the view that criminal offenses under laws passed by Congress may not be prosecuted except in courts established pursuant to Article III (411 U.S. at 400).

Thereafter, on May 15, 1973, Palmore filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia, naming as respondents the Superior Court of the District of Columbia, the Attorney General of the United States and the Director of the District of Columbia Department of Corrections.[4] The petition was based on the same Fourth Amendment claim Palmore had pursued on direct appeal to the District of Columbia Court of Appeals. On July 10, 1974, the district court dismissed the petition on the ground that Congress had deprived it of jurisdiction by providing in 23 D.C. Code 110(a) that post-conviction collateral attacks against convictions of the Superior Court of the District of Columbia were to be made to that court, and also by the express provision of Section 110(g) that an application for a writ of habeas corpus "shall not be entertained by * * * any Federal or State court if it appears that the applicant has failed to make a motion for relief under [Section 110] or that the

[4] Then, as now, respondent was on bond pending appeal.

Superior Court has denied him relief * * *" (App. C, *infra*, pp. 55a-56a).[5]

Palmore appealed to the United States Court of Appeals for the District of Columbia Circuit, contending (1) that Congress did not intend 23 D.C. Code 110(g) to bar the United States District Court from entertaining collateral attacks against convictions obtained in the Superior Court, and (2) that if Section 110(g) contained such a jurisdictional limitation, it was unconstitutional under the Suspension Clause of the Constitution (Article I, Section 9, Clause 2) and under principles of equal protection embodied in the Due Process Clause of the Fifth Amendment. These contentions were based on the premise that persons convicted under a criminal statute passed by Congress are or at least may be constitutionally entitled to collateral review of their convictions by Article III judges.

Over the dissent of one judge, the court of appeals, sitting *en banc*, held that Section 110(g) was not a limitation on the power of the United States District Court to entertain collateral attacks against convictions of the Superior Court, but only an exhaustion of remedies provision requiring initial submission of post-conviction claims to the local courts. Finding that Palmore had exhausted his remedy under Sec-

[5] The district court also noted (App. C, *infra*, p. 56a) that Palmore was "authorized by Title 23, D.C. Code § 110(a) to apply for relief by motion but has failed to do so" and that "there is no showing that the Superior Court has denied him relief or that the remedy by motion is inadequate or ineffective to test the legality of his detention * * *."

tion 110 by his appeal, the court of appeals reversed the judgment of the district court and remanded the case to that court for a decision on the merits of Palmore's Fourth Amendment claim (App. A, *infra*).

2. *Pressley* v. *Swain*.

Following a jury trial in the Superior Court of the District of Columbia, respondent Pressley was convicted on April 22, 1971, of grand larceny, in violation of 22 D.C. Code 2201, and of larceny from the District of Columbia government, in violation of 22 D.C. Code 2206. On October 1, 1971, he was sentenced to concurrent prison terms of 32 to 96 months on the grand larceny conviction and 20 to 60 months on the conviction for larceny from the District of Columbia government. On appeal, respondent contended that inconsistencies between the testimony of two government witnesses concerning the physical appearance of the typewriter he was alleged to have stolen reflected perjury by one of them. On May 22, 1972, the District of Columbia Court of Appeals affirmed his conviction in an unpublished order, stating that "the record disclosed no error affecting the substantial rights of appellant" (App. D, *infra*, p. 58a).

On June 5, 1972, respondent filed an untimely *pro se* motion for a new trial in the Superior Court, claiming ineffective assistance of counsel because his attorney had failed to move for suppression of the typewriter respondent allegedly had stolen. The court denied the motion. Setting forth its reasons in some detail, on March 2, 1973, the District of Columbia

Court of Appeals affirmed the Superior Court's order denying the motion. During the pendency of the appeal, Pressley filed a *pro se* motion in the Superior Court to compel production of the grand jury voting record in his case. On September 8, 1972, the motion was denied by the trial court on the ground that it lacked jurisdiction. On June 6, 1973, the District of Columbia Court of Appeals affirmed the Superior Court's denial of the motion, not on the jurisdictional grounds on which the Superior Court had relied, but on the merits[6] (App. D, *infra*, pp. 58a-59a).

On May 11, 1973, respondent, who was then serving his sentence at the Lorton Reformatory in Lorton, Virginia, filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. 2241, *et seq.*, in the United States District Court for the District of Columbia.[7] The petition was directed against C. L. Swain, the Superintendent of the Lorton Reformatory. It alleged that Pressley, who had been represented by counsel of his choice at trial, was denied the effective assistance of counsel guaranteed by the Sixth Amendment[8] (App. D, *infra*, p. 59a). After a hearing on the question of the court's jurisdiction to entertain the petition, the district court entered an order on

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[6] Each of respondent's three appeals was fully briefed and argued by appointed counsel.

[7] Respondent has since been released from custody and was placed on parole on January 1, 1974. His parole is due to expire on April 21, 1979.

[8] His claim in this regard raised issues in addition to that raised in his motion for a new trial in the Superior Court.

July 19, 1973, dismissing the petition for want of jurisdiction "by virtue of 23 D.C. Code § 110(g)" (App. F, *infra*, p. 66a). Respondent appealed.

On October 30, 1974, the United States Court of Appeals for the District of Columbia Circuit, *sua sponte*, remanded the record to the district court to clarify its order of dismissal. On November 12, 1974, the district court "respectfully advise[d] that on the papers then before it, it appeared that appellant had not adequately exhausted his remedies in the local court system. The Court made no determination as to the constitutionality of 23 D.C. Code § 110" (App. G, *infra*, p. 67a). The district court concluded only that "[i]t was not apparent that the suppression issue had ever been analyzed and there were aspects of the adequacy of counsel not passed upon at the local level. The writ should have been initially filed in the local courts" (*id.* at 68a-69a). The court "did not feel the question of the ultimate effect of 23 D.C. Code § 110 upon the viability of a further writ of habeas corpus in the District Court was ripe for decision in this case" (*ibid.*).

Pressley appealed to the United States Court of Appeals for the District of Columbia Circuit. That court *en banc*, again over the dissent of one judge, reversed the judgment of the district court and remanded the case for a decision on the merits (App. D, *infra*).

3. The Court of Appeals Opinions.

In a lengthy opinion, the court of appeals began its analysis in the *Palmore* case with the premise that

"statutes should be interpreted to avoid difficult constitutional questions" (App. A, *infra*, p. 5a). It therefore rejected the government's "clear meaning construction" of 23 D.C. Code 110(g), saying that such a construction "may have a significant impact on the traditional [habeas corpus] jurisdiction of certain article III courts" (*id.* at 10a-11a), would divest this Court of jurisdiction to entertain motions for original writs of habeas corpus (*id.* at 12a), and would raise questions "whether by singling out those convicted of local District of Columbia crimes for eliminating access to article III courts Congress has violated the concept of equal protection of law" (*id.* at 14a).

The court found no "clear or simple resolution" (App. A, *infra*, p. 20a) of the conflicting views of the parties regarding the Suspension Clause, expressed concern that discretionary review by this Court "as the sole protection of important interests may be both inadequate and impracticable" (*id.* at 21a), and noted that while the Superior Court "is undeniably a federal court in the sense that it was *created* by Congress, it is not a federal court as *defined* by Congress in the Court Reform Act" (*ibid.*). The court concluded that these "significant 'variable[s]' " required rejection of the Government's " 'clear meaning' approach to the statute" (*id.* at 22a).

On the equal protection question, the court defined the right that Palmore was asserting as "the guarantee to have his claim heard in an article III court" (App. A, *infra*, pp. 24a-25a). It questioned whether

Section 110(g) is a means sufficiently related to the overriding purpose of the Court Reform Act—to reorganize the administration of criminal justice in the District of Columbia to help alleviate the crime problem—as to be constitutional (App. A, *infra*, p. 26a). It also noted that, under the government's theory, Section 110(g) only divests the district court of jurisdiction to hear post-conviction writs, not pre-trial petitions, and it expressed uncertainty over whether any rational justification could be advanced for this classification (*id.* at 26a-27a).

Turning to the legislative history, the court said it found nowhere in the legislative history "an explicit reference or even a suggestion that section 110 was to have the jurisdictional impact that the district court accorded it" (App. A, *infra*, p. 28a). Rather, it found the legislative intent behind Section 110 to be the provision of a detailed statutory collateral attack remedy in the Superior Court, in order not to leave that court to rely solely on its inherent power (*id.* at 29a-31a). In sum, the court found nothing to indicate a congressional intent to eliminate "by implication" the habeas corpus remedy in the Article III federal courts and in this Court (*id.* at 30a). It found significant the fact that Congress sought in the Court Reform Act to create a court of general local jurisdiction like those of the States and to make the federal district court more like federal district courts elsewhere (*id.* at 33a-38a). "The only construction of section 110 consistent with this [state-federal] analogy, is that Congress never intended to

affect the district court's habeas jurisdiction" (*id.* at 35a).

Finally, the court (App. A, *infra*, pp. 42a-45a) analogized the situation presented by these cases to other cases involving other statutes, particularly those involving the military justice system, in which this Court has rejected a statutory construction that "raised the spectre that recourse through habeas corpus to the article III courts to test the legality of detention would not be available" (*id.* at 42a).

Reiterating its premise that "courts should interpret statutes to avoid difficult constitutional questions and that the constitutional questions raised are both novel and difficult," the court concluded "that Congress never intended to, nor does section 110 actually, affect the district court's jurisdiction to entertain post-conviction habeas petitions from local prisoners" (App. A, *infra*, p. 45a). "Instead, we hold that section 110(g) is an exhaustion of remedies statute, requiring initial submission of claims to the local courts and marking * * * the terminal point for proceedings in the local court system" (*ibid.*).

Judge Robb dissented. He first stated his belief that the "plain language [of Section 110(g)] means exactly what it says," and he rejected "the premise upon which the majority avoids what it considers to be difficult constitutional questions" (App. A, *infra*, p. 49a). Turning to those questions, Judge Robb noted that the relief available in the Superior Court under 23 D.C. Code 110 is the equivalent of that available in a United States District Court under 28

U.S.C. 2255; since the scope of Section 2255 is "exactly commensurate" with the scope of habeas corpus, "the relief defined in section 110, therefore, is the equivalent of federal habeas corpus relief" (*id.* at 50a). Thus, said Judge Robb, the entire question "is reduced to the difference in the tenure and salary protections accorded District Court and Superior Court judges" (*ibid.*).

That question he found answered in the principles of this Court's decision in *Palmore* v. *United States*, 411 U.S. 389 (App. A, *infra*, pp. 50a-51a). For if the District's Article I courts are competent to administer its criminal justice system in the first instance, they are also "competent to dispense collateral post-conviction relief exclusive of the habeas corpus jurisdiction of Article III courts" (*id.* at 51a). On the equal protection question, Judge Robb concluded in somewhat the same vein that if there is no "invidious discrimination" when a person in the District of Columbia is tried in an Article I court under this Court's decision in *Palmore*, "it follows that it is not a denial of equal protection when that person is required to present his application for collateral relief to an Article I District of Columbia court" (*id.* at 51a-52a).

In its opinion in *Pressley*, the court of appeals concluded that Pressley had "exhausted his local remedies by first pursuing his claim through a motion under section 110"[9] (App. D, *infra*, p. 62a), and it

[9] This conclusion is open to serious question. See pp. 8-9, *supra*.

therefore held that the district court erred in dismissing the petition on exhaustion grounds (*id.* at 61a-63a). Then, following its decision in *Palmore*, the court reversed and remanded the case for consideration by the district court on the merits (*id.* at 63a). Judge Robb again dissented.

REASONS FOR GRANTING THE WRIT

Despite the clear language of 23 D.C. Code 110(g) generally prohibiting "any Federal or State Court" from entertaining habeas corpus applications seeking to overturn judgments of conviction of the Superior Court of the District of Columbia, the court of appeals in these cases held that Congress did not intend to make the Superior Court the exclusive forum for collateral attacks on its judgments and that habeas corpus is available in the United States District Court. These decisions will have a significant impact upon the allocation of jurisdiction and final review power between the two court systems in the District of Columbia and will undercut the congressional policy embodied in the District of Columbia Court Reform and Criminal Procedure Act. Moreover, the construction placed on the statute by the court of appeals in an effort "to avoid difficult constitutional issues" so far departs from established principles of statutory construction, and so clearly disregards the meaning previously given by this Court to the identical statutory language of 28 U.S.C. 2255, as to warrant review by this Court.

One extraordinary aspect of this case that, we submit, makes it especially important that this Court resolve the question we present, is that that question implicates a fundamental dispute between the Superior Court of the District of Columbia, one of the petitioners herein, and the District's federal courts. As the matter now stands, this dispute over allocation of judicial powers has, in effect, been determined by one of the competing claimants. While we recognize that it was both necessary and entirely proper that the court of appeals decide the issue in the context of these cases, final resolution of the question by the Supreme Court is especially appropriate in the circumstances.

1. The decisions of the court of appeals in these cases, if allowed to stand, will dramatically alter the allocation of jurisdiction and final review power between the two court systems in the District of Columbia and will undercut the congressional policy embodied in the District of Columbia Court Reform and Criminal Procedure Act of 1970. Those decisions will mean that the United States Court of Appeals for the District of Columbia Circuit will again have the authority to review the actions of the local court system, despite the fact that one of the major purposes of court reorganization was to eliminate that power. As a result, there will be a diminution of the stature and integrity of the local court system as well as a strain on the resources of the federal court system comparable to the one that contributed in 1970 to the decision of Congress to remove jurisdiction

over local offenses from the district court. The issue we present is, we submit, thus so fundamental to the allocation of judicial powers in the District of Columbia that review by this Court is essential.

Prior to court reorganization, the United States District Court for the District of Columbia had jurisdiction over local felony prosecutions under the District of Columbia Code; appeals from convictions were to the United States Court of Appeals for the District of Columbia Circuit, with that court ultimately developing the criminal jurisprudence for the District of Columbia. A principal accomplishment of the District of Columbia Court Reform and Criminal Procedure Act of 1970 was to change that situation by removing jurisdiction over local criminal offenses from the federal district court and the federal appellate court and reposing it in the local court system. The thrust of court reorganization was to assure that the United States District Court and the United States Court of Appeals, unable to cope with their burgeoning caseloads, would no longer be burdened with business of a purely local nature. See *Palmore* v. *United States*, *supra*, 411 U.S. at 408-409; S. Rep. No. 91-405, 91st Cong., 1st Sess., pp. 1-3, 5 (1969); H.R. Rep. No. 91-907, 91st Cong., 2d Sess., pp. 23-25, 33-35 (1970). At the same time, the legislation substantially expanded and upgraded the local court system.

In the Court Reform Act, Congress expressly designated the District of Columbia Court of Appeals as "the highest court of the District of Columbia"

(11 D.C. Code 102), and it intended that court to function as the final arbiter of claims in the local court system, with review available only by a writ of certiorari or appeal to this Court. The decisions in these cases frustrate the congressional intent by again placing any three-judge panel of the United States Court of Appeals, or even a single United States District Judge, in a position to overturn decisions of the District of Columbia Court of Appeals.

Moreover, once it is clear that the mere allegation in the Superior Court of a constitutional violation will automatically open the door to the federal courthouse, it will surely become commonplace for persons convicted after trial in the Superior Court to seek habeas corpus in the United States District Court, thereby adding another resource-consuming layer of litigation between the institution of a criminal case and its final determination.[10] The purpose

[10] The United States Attorney for the District of Columbia has informed us that in the eleven months from January 1, 1975, to November 30, 1975, there were approximately 1036 convictions after trial in the Superior Court (approximately 600 misdemeanors and 436 felonies). The Clerk of the District of Columbia Court of Appeals has advised us that during the same period of time that court decided 346 appeals in criminal cases from the Superior Court. His review of the records indicates that appellants in 251 of those cases raised federal constitutional issues. 120 were appeals by defendants, 125 were appeals by the United States (78 of which involved the constitutionality of a single statute), and six were appeals by the District of Columbia. If federal habeas corpus routinely becomes the next step in the process of review—as surely it will under the decisions in the instant cases—a large number of cases can thus be expected to find their way by means of

of the Court Reform Act was precisely to avoid that result. Cf. *Palmore* v. *United States*, *supra*, 411 U.S. at 408-409.[11]

habeas corpus to the United States District Court and ultimately to the United States Court of Appeals.

The frequency of resort to federal habeas corpus will, moreover, be increased in no small part by the frequency of disagreement between the two court systems on such issues as search and seizure or the standards for assessing effectiveness of counsel. Compare, *e.g.*, *United States* v. *Robinson*, 471 F.2d 1082 (C.A.D.C.), reversed, 414 U.S. 218, with *United States* v. *Simmons*, 302 A.2d 728 (D.C. App.) (search and seizure); *United States* v. *DeCoster*, 487 F.2d 1197 (C.A. D.C.), with *Herbert* v. *United States*, 340 A.2d 802, 804 (D.C. App.), and *Angarano* v. *United States*, 312 A.2d 295, 298-299, petition for rehearing denied, 329 A.2d 453 (D.C. App.) (ineffective assistance of counsel).

[11] Indeed, the decisions in these cases may have nationwide implications, because persons convicted and sentenced in the Superior Court of the District of Columbia and committed to the custody of the Attorney General are usually confined at correctional facilities outside the District of Columbia. Under the decisions in the present cases, however, those prisoners, after exhausting their Superior Court remedies under Section 110, would seemingly be free to file federal habeas corpus petitions in the district where they are confined. Thus, Superior Court convictions may well be subject to attack all over the country in courts applying differing interpretations of the Constitution as it affects the District of Columbia Code. The potential practical impact of this result is significant; we have been advised by the United States Bureau of Prisons that, as of October 28, 1975, a total of 2,678 persons who have been convicted of violations of the District of Columbia Code are incarcerated in institutions outside the District of Columbia (2,060 of them at Lorton Reformatory, in the Eastern District of Virginia), while only 651 such persons are incarcerated within the District of Columbia. Thus, the holdings of the court below will produce the precise effect that Section

2. The construction placed on 23 D.C. Code 110 by the court of appeals in these cases so far departs from established principles of statutory construction, and so clearly disregards the meaning previously given by this Court to identical statutory language, as to warrant review by this Court.

23 D.C. Code 110 by its terms grants to the Superior Court the general power to entertain collateral attacks upon its own convictions (23 D.C. Code 110 (a)); it provides for appeal only to the District of Columbia Court of Appeals (23 D.C. Code 110(f)), with ultimate review available in this Court. Subsection (g) explicitly prohibits any other court, including the United States District Courts, from entertaining attacks on Superior Court convictions if the applicant has failed first to seek relief in the Superior Court under Section 110 *or* if he has sought relief from the Superior Court and relief has been

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2255 (the model for 23 D.C. Code 110) was designed to prevent—that effect being to permit the court for the district where the prisoner is confined to second-guess the sentencing court and the appellate court to which it is responsible.

Moreover, there is some question whether the federal district court in the District of Columbia would have jurisdiction over the custodian of an institution outside the District—here, whether the court had jurisdiction in *Pressley* over Superintendent Swain, the warden of Lorton Reformatory. The court of appeals has held that the Superintendent of Lorton is, for some purposes, a federal official "within the District of Columbia" and therefore may be sued in the United States District Court for the District of Columbia. *McCall* v. *Swain*, 510 F.2d 167 (C.A.D.C.). In any event, however, the question of which federal district court (if any) has jurisdiction over Superintendent Swain was not directly contested in the courts below.

denied. These two categories appear to include the entire universe of persons convicted in the Superior Court; they certainly encompass the respondents herein. The only exception to this prohibition is where the remedy by motion to the Superior Court is "inadequate or ineffective to test the legality of [a prisoner's] detention" (23 D.C. Code 110(g)). Apart from respondents' constitutional objections to the status of the Superior Court, there is no suggestion that that court fails to provide an adequate and effective forum to adjudicate respondents' collateral attacks on their convictions.[12]

Despite this clear congressional directive that a petition for habeas corpus "shall not be entertained" once the Superior Court has denied relief, the court of appeals concluded that Congress did not intend by Section 110(g) to "affect the [federal] district courts' jurisdiction to entertain post-conviction habeas petitions from local prisoners" but merely intended to create "an exhaustion of remedies statute, requiring initial submission of claims to the local courts" (App. A, *infra*, p. 45a).

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[12] A statutory collateral attack remedy is not "inadequate or ineffective" merely because the sentencing court has refused relief or because the decisional law in the court in which the defendant was convicted and sentenced is less favorable to him than that in the court in which habeas corpus would lie. The remedy is "inadequate or ineffective" only if it can be shown that some limitation on scope or procedure prevented the collateral attack proceeding from providing a full hearing and adjudication. See, *e.g.*, *Application of Galante*, 437 F.2d 1164, 1165 (C.A. 3); *Accardi* v. *Blackwell*, 412 F.2d 911, 913-914 (C.A. 5); *Cain* v. *Markley*, 347 F.2d 408, 410 (C.A. 7).

The decision of the court of appeals flouts the unambiguous language of the statute. If Section 110 (g) is read, as it must be under established principles of statutory construction,[13] in an effort to give each part of the provision its intended meaning, it is apparent that the Section cannot be what the court of appeals held it to be, a mere exhaustion of remedies provision. While one clause ("shall not be entertained * * * if it appears that the applicant has failed to make a motion for relief under this section") properly may be interpreted as precluding relief in the federal district courts (and other courts) absent the exhaustion of remedies in the local Superior Court, the second independent clause ("shall not be entertained * * * if it appears * * * that the Superior Court has denied him relief") clearly denies the United States District Courts jurisdiction to award post-conviction relief to prisoners convicted in the Superior Court who have exhausted their remedies in the Superior Court. In short, relief is available in the district court under the statute only when the remedy by motion to the Superior Court is "inadequate or ineffective." There has been no claim of such inadequacy or ineffectiveness here.

Moreover, 23 D.C. Code 110 was modeled on 28 U.S.C. 2255, "with only the necessary technical changes," and was intended to operate in an identical manner. S. Rep. No. 91-405, *supra*, at p. 38; H.R.

[13] See *Caminetti* v. *United States*, 242 U.S. 470, 485-486; 2A Sutherland, *Statutes and Statutory Construction*, §§ 46.01, 46.06 (4th ed. 1973).

Rep. No. 91-907, *supra*, at p. 117. It is established that the purpose of Section 2255 was to provide in the sentencing court a statutory substitute for traditional habeas corpus "exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." *Hill* v. *United States*, 368 U.S. 424, 427. See also *Sanders* v. *United States*, 373 U.S. 1, 13-15; *United States* v. *Morgan*, 346 U.S. 502, 511; *United States* v. *Hayman*, 342 U.S. 205, 219; 2 Wright, *Federal Practice and Procedure* 579, 589 (1969).

There is not the slightest suggestion in any of this Court's opinions that the language of Section 2255, identical to that of 23 D.C. Code 110(g), is merely an exhaustion of remedies provision, entitling a prisoner to seek habeas corpus in another court after having been unsuccessful in the collateral attack proceeding in the sentencing court. See 2 Wright, *Federal Practice and Procedure*, *supra*, at 584-585. Rather, the opinions of this Court cited above make clear that Section 2255 provides a substitute remedy in the sentencing court, with no other court being permitted to entertain an application for habeas corpus if the sentencing court has considered the application for relief and denied it.[14] It is not justifiable to give the identical language in these two closely related statutes contradictory meanings.

[14] One commentator, who served as counsel to the Senate District Committee when it reported out the Court Reform Act, has stated: "[T]he Court Reorganization Act extinguishes the traditional authority of the federal courts to re-

3. Apart from the difficulty of squaring the result reached by the court of appeals with the language of the statute itself, the decisions in these cases raise other fundamental questions regarding their methodology of statutory construction that warrant review by this Court.

The first involves the novel proposition that it is proper to disregard a plain and seemingly unambiguous statutory directive on the basis of the conclusion that the legislative history does not affirmatively disclose that Congress meant what it said, when that history equally fails to demonstrate that Congress meant anything else. This approach by the court of appeals is a radical new departure in the field of statutory interpretation.

The second technique, although seemingly less unconventional, is even more deserving of the attention of this Court. The court of appeals justified its "construction" of the statute as being undertaken in order "to avoid difficult constitutional questions" (App. A, *infra*, pp. 5a, 45a). While we do not question the propriety of the related but materially different precept that statutes are, whenever possible, to be construed to avoid unconstitutionality, it by no means follows that it is proper to reject the result intended

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view local judicial action by the issuance of writs of habeas corpus." Williams, *District of Columbia Court Reorganization, 1970*, 59 Geo. L. J. 477, 499 (1971). See also Rauh and Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 Am. U. L. Rev. 252, 339-340 (1970).

by the legislature simply in order to avoid considering the possible constitutional difficulties with such a result.[15] That is particularly so where, as here, it is necessary to read an entire phrase out of the statute in order to avoid considering the constitutionality of that phrase.

What has actually happened in this case, we respectfully submit, was not at bottom statutory construction. Nowhere does the court explain what meaning is to be attached to the words of Section 110(g) to authorize the result reached. Rather, the last clause of that Section has been, in effect, declared unconstitutional—this result being justified by the desire to avoid deciding the constitutional issues presented.

4. The constitutional objections leveled against the statutory preclusion of habeas corpus jurisdiction in a federal district court are principally two: that, by remitting persons convicted in the Superior Court of the District of Columbia solely to collateral

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[15] As Justice Frankfurter admonished:

> The Court-devised precept against avoidable conflict with Congress through unnecessary constitutional adjudication is not a requirement to distort an enactment in order to escape such adjudication. Respect for the doctrine demands and only permits * * * extract[ing] an interpretation which shies off constitutional controversy, *provided* such interpretation is consonant with a fair reading of a statute.

International Association of Machinists v. *Street*, 367 U.S. 740, 799-800 (Frankfurter, J., dissenting). See also Friendly, *Benchmarks* 210-212 (1967).

remedies provided in that court, Congress has to that extent impermissibly suspended the availability of the writ of habeas corpus, in violation of Article I, Section 9, Clause 2; and that the restriction also violates equal protection principles embodied in the Due Process Clause of the Fifth Amendment by depriving District of Columbia defendants of access to a federal district court that is available to persons convicted in state courts or, perhaps, in federal district court.

We see no purpose to be served at this point in discussing the merits of these contentions at any length. Whatever else may be said, the unconstitutionality of Section 110 on either of these grounds is far from plain; on the contrary, as Judge Robb indicated in his dissent, this Court's earlier *Palmore* decision suggests that respondents have a hard row to hoe in this regard. Surely, if the congressional purpose to exclude the federal district courts from the administration of local criminal law in the District of Columbia is to be overriden on either of these constitutional grounds, it should be done by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writs of certiorari should be granted.

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DECEMBER 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 74-1832

ROOSEVELT F. PALMORE, APPELLANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA ET AL.

Argued April 24, 1975

Decided July 9, 1975

Appeal from the United States District Court
for the District of Columbia
(D.C. Habeas Corpus 31-73)

Frank F. Flegal, Washington, D. C., for appellant in No. 74-1832.

Albert H. Turkus, Asst. U. S. Atty., with whom Earl J. Silbert, U. S. Atty., John A. Terry, Warren R. King, Craig M. Bradley, and Tobey W. Kaczensky, Asst. U. S. Attys., were on the brief for appellees.

Before BAZELON, Chief Judge, and WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB and WILKEY, Circuit Judges, sitting en banc.

Opinion for the Court filed by Circuit Judge TAMM.

Dissenting opinion filed by Circuit Judge ROBB.

TAMM, Circuit Judge:

This case and its companion, Pressley v. Swain, No. 73-1975, also decided today, present the important question whether Congress, by enacting 23 D.C. Code § 110(g) (1973), as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, eliminated the jurisdiction of the United States District Court for the District of Columbia to entertain post-conviction petitions for writs of habeas corpus brought by individuals convicted in the Superior Court. Answering that question negatively, we reverse the district court's dismissal of such a petition for lack of jurisdiction and remand for consideration on the merits.

I

On February 23, 1971, appellant Palmore was indicted in the Superior Court of the District of Columbia for carrying a pistol without a license in violation of 22 D.C.Code § 3204 (1973). Prior to trial, he unsuccessfully moved to suppress evidence on fourth amendment grounds, and thereafter, was convicted in a non-jury trial and sentenced. A. 12-44.[1] Palmore appealed to the District of Columbia Court of Appeals which, passing fully upon his fourth amendment claim, affirmed his conviction. Palmore

[1] Appellant was sentenced to two to six years imprisonment. Except for six months, execution of the sentence was suspended, and Palmore was placed on probation for six years. A. 45.

v. United States, 290 A.2d 573, 580-84 (D.C.Ct.App. 1972). On further review the Supreme Court affirmed his conviction without considering Palmore's fourth amendment claim. Palmore v. United States, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973).[2]

Before the Supreme Court's mandate had issued, Palmore petitioned for a writ of habeas corpus in the United States District Court for the District of Columbia, alleging that he was being held in custody in violation of the fourth amendment. On July 10, 1974, the district court dismissed his petition on the ground that "Congress has deprived this Court of jurisdiction by providing in 23 D.C.Code § 110(a) that post-conviction collateral attack upon convictions in the Superior Court of the District of Columbia may be made by motion in that court. . . ."[3] This appeal followed.

[2] The Supreme Court postponed the question of its jurisdiction until consideration of the merits. The Court eventually decided that review from the District of Columbia Court of Appeals would be by certiorari rather than appeal, and then granted certiorari limited to the question of whether appellant could constitutionally be tried for a congressionally-enacted criminal offense in other than an article III court. Palmore v. United States, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973).

[3] A. 8. The court further noted that § 110 authorized appellant to apply for relief in Superior Court, and he had not done so nor had he demonstrated why that remedy was "inadequate and ineffective". A. 9.

Palmore had been freed on bail pending direct review of his conviction. The district judge first continued bail pending his disposition of Palmore's petition and has now continued bail pending this appeal. A. 7, 11.

Appellant makes two arguments in support of jurisdiction—one statutory, the other constitutional.[4] First, he argues that 23 D.C.Code § 110(g) should not be construed to deprive the district court of its traditional habeas corpus jurisdiction because Congress itself never intended such a result. Second, he contends that if section 110(g) divests the district court of its jurisdiction, the statute is unconstitutional because it: (1) constitutes a suspension of the writ of habeas corpus contrary to article I, section 9, clause 2 of the Constitution[5] and (2), denies him the equal protection of the laws inherent in the due process clause of the fifth amendment.

The Government, in opposition to each contention advanced by appellant, initially argues that the statute is clear on its face, and the only possible construction of it precludes post-conviction relief in the United States District Court for the District of Columbia for an individual convicted in Superior Court. Further, the Government contends that section 110(g), so construed, is a proper exercise of Congress' power to define and limit the jurisdiction of federal courts, is not a suspension of the writ of habeas

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[4] As mentioned *supra*, the identical issue was raised and analogous arguments advanced in Pressley v. Swain, No. 73-1975, which was argued before this court the same day as the instant case. Arguments made in *Pressley* have been given the fullest consideration in the preparation of this opinion.

[5] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

corpus, and does not create an irrational classification in violation of the equal protection guarantee of the due process clause.

[1] As discussed in detail below, we conclude that section 110(g) does not so restrict the jurisdiction of the district court, but is merely an exhaustion of remedies requirement. Acceptance of the Government's construction would result in significant changes in habeas corpus jurisdiction traditionally exercised by the federal courts, and force us directly to confront serious and significant constitutional questions; the Government would have us take this route into previously uncharted constitutional waters without a scintilla of Congressional intent to endorse it. Instead, we conclude that Congress never intended to affect the federal courts' habeas jurisdiction by enacting section 110(g). In so doing, we reaffirm the concept that statutes should be interpreted to avoid difficult constitutional questions, questions which necessitate in this case inquiry beyond the face of the statute to its legislative history. This inquiry leads us to a result consistent with that legislative history and the primary purposes behind the Court Reform Act itself.

II

In 1970, Congress passed the District of Columbia Court Reform and Criminal Procedure Act, Pub.L. No. 91-358, 84 Stat. 473 (Court Reform Act) resulting in a fundamental reorganization of judicial administration in this jurisdiction. See Palmore v.

United States, *supra*, 411 U.S. at 392 n.2, 93 S.Ct. 1670. Thereafter, courts have struggled to interpret the Act properly and to define the relationship between the court systems it created. *See, e.g.*, McCall v. Swain, 167 U.S.App.D.C. ——, 510 F.2d 167 (1975) (district court jurisdiction and interpretation of 16 D.C.Code § 1901 (1973)); Johnson v. Robinson, 166 U.S.App.D.C. ——, 509 F.2d 395 (1974) (interpreting pre-habeas exhaustion requirement of 24 D.C.Code § 301(k)(7)); M.A.P. v. Ryan, 285 A. 2d 310 (D.C.Ct.App. 1971) (stare decisis effect of federal decisions for local courts); *cf.* Luck v. Baltimore & Ohio Railroad Co., 166 U.S.App.D.C. ——, 510 F.2d 663, 665-66 (1975) (applicability of *Erie* doctrine to District). The instant case presents another such situation.[6]

23 D.C.Code § 110 (1973)[7] provides for post-conviction relief in the Superior Court of the District of Columbia. Subsection (g) reads:

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[6] In Pernell v. Southall Realty, 416 U.S. 363, 368 n.4, 94 S.Ct. 1723, 1726, 40 L.Ed.2d 198 (1974), the Court acknowledged the apparently unresolved question of the district court's post-court reform habeas jurisdiction and recognized if section 110(g) stripped the district court of jurisdiction to entertain post-conviction petitions, that raised the issue of whether the Supreme Court "has a special obligation to resolve conflicts between the District's 'local' and 'federal' courts on questions of constitutional law raised in such petitions."

[7] § 23-110. Remedies on motion attacking sentence

(a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

(b) A motion for such relief may be made at any time.

(c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that (1) the judgment was rendered without jurisdiction, (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, (3) there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner, resentence him, grant a new trial, or correct the sentence, as may appear appropriate.

(d) A court may entertain and determine the motion without requiring the production of the prisoner at the hearing.

(e) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

(f) An appeal may be taken to the District of Columbia Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State Court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply

> for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State Court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

The district court held that this section divested it of jurisdiction to entertain appellant's post-conviction petition for a writ of habeas corpus. A. 8-9.

A

Appellant asserts that the district court erred in this regard. Contrariwise, the Government repeatedly argues that the language of subsection (g) is "clear and unambiguous" and claims that "this Court would be denying the manifest intent of Congress if [we] were to construe the statute in any way other than to preclude post-conviction relief in the District Court for one convicted in the Superior Court." Gov't. Br. at 13. The Government concedes appellant's point that courts often construe statutes to avoid difficult constitutional questions,[8] but asserts that such an approach is inappropriate where the statute's meaning is clear. *See, e.g.*, Jay v. Boyd,

[8] Gov't Br. at 12; *see, e.g.*, United States v. Rumely, 345 U.S. 41, 45, 73 S.Ct. 543, 97 L.Ed. 770 (1953); Crowell v. Benson, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932); The Japanese Immigrant Case, 189 U.S. 86, 101, 23 S.Ct. 611, 47 L.Ed.2d 721 (1903).

351 U.S. 345, 357 n.21, 76 S.Ct. 919, 100 L.Ed. 1242 (1956); United States v. Thompson, 147 U.S.App. D.C. 1, 452 F.2d 1333; 1341 (1971), cert. denied, 405 U.S. 998, 92 S.Ct. 1251, 31 L.Ed.2d 467 (1972) (if Congress clearly intended unconstitutional result, court's responsibility is to invalidate the law).

As to the proper methodology to apply when a statute is facially clear and unambiguous, the Government advances the rule of Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917) (citations omitted):

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.
>
> Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.

The Government contends that appellant's argument that the district court's interpretation of the statute receives no support in its legislative history[9] flies in the face of established principles of statutory construction:

> Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken

[9] See notes 32-39 *infra* accompanying and text.

> into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.

Gov't. Br. at 22-23, *quoting* United States v. Missouri Pacific R.R. Co., 278 U.S. 269, 278, 49 S.Ct. 133, 73 L.Ed. 322 (1929) (citations omitted).

[2, 3] However, recognizing that statutory construction is, at best, an imperfect science, *see* Schiaffo v. Helstoski, 492 F.2d 413 (3rd Cir. 1974), the Supreme Court has cautioned that "[g]eneralities about statutory construction help us little. *They are not rules of law but merely axioms of experience.* They do not solve the special difficulties in constructing a particular statute. The variables render every problem of statutory construction unique." United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952) (emphasis added, citations omitted). The variables in this case include the recognition that section 110 (g), passed in an Act creating an independent local court system,[10] may have a significant impact on the

[10] The Superior Court of the District of Columbia is clearly a court created under Congress' article I legislative powers. Palmore v. United States, *supra*, 411 U.S. at 398-99, 93 S.Ct. 1670.

traditional jurisdiction of certain article III courts. Indeed, the district court determined that the statute divested it of jurisdiction to entertain appellant's application for a writ of habeas corpus, a construction which implies that Congress has eliminated jurisdiction, presently contained in 28 U.S.C. §§ 2241 *et seq.* (1970), which the inferior article III courts have passed since the passage of the Judiciary Act of 1789.[11] Section 110(g) would thereby represent a fundamental change in the administration in the District of Columbia of the Great Writ, "the most celebrated writ in the English Law," [12] the effectiveness of which is protected by the Constitution itself. Further, even under this interpretation, Congress has only *partially* divested the district court of its traditional habeas jurisdiction. The bar of section 110(g) only extends to post-conviction collateral attacks; the district court may entertain petitions for writs of individuals who stand accused of "local crimes" [13] and wish to test the legality of their detention.[14]

[11] *See* Judiciary Act of 1789 § 14, 1 Stat. 73, 81-82 (1789).

[12] 3 Blackstone's Commentaries 129.

[13] The term in this context refers to congressionally enacted criminal statutes applicable only to the District of Columbia and codified in the District of Columbia Code.

[14] Of course, the courts in their discretion may decline to exercise their jurisdiction. As yet unresolved is the applicability of the *Younger* line of cases to the relationship of the District's two court systems, especially if there is no post-conviction collateral attack available in the article III courts.

[4, 5] Under the Government's clear meaning construction, the inferior article III courts would not be the only courts affected, since the operative language of section 110(g) bars entertainment of petitions for writs of habeas corpus by "*any* Federal or State Court", ostensibly including the Supreme Court of the United States. *See* 11 D.C.Code § 101(1)(A) (1973). This reading of section 110(g) would divest the Supreme Court of jurisdiction to entertain motions for "original" writs of habeas corpus [15] in situations like the one at bar, overturning nearly two hundred years of practice.[16] Granted this "original" writ has lost much of its practical utility,[17] nonetheless its availability has been utilized, especially by *pro se* prisoners' petitions.[18]

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *see* Pernell v. Southall Realty, *supra*, 416 U.S. at 368 n.4, 94 S.Ct. 1723.

[15] *See* 28 U.S.C. § 2241(a), (b) (1970). This "original" writ of habeas corpus is part of the Supreme Court's appellate jurisdiction, *see* Ex. parte Bollman, 8 U.S. (4 Cranch) 75, 94-95, 2 L.Ed. 554 (1807), which under article III is subject to exceptions that Congress may provide. *See generally*, Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 Sup.Ct.Rev. 153. It is clear that the Supreme Court, aside from section 110(g), would have appellate jurisdiction to issue the writ on behalf of one convicted in Superior Court. *See* Palmore v. United States, *supra*; United States v. Coe, 155 U.S. 76, 86, 15 S.Ct. 16, 39 L.Ed. 76 (1894); Oaks, *supra*, at 166-67.

[16] The Supreme Court has protected its habeas jurisdiction and has construed Congressional attempts to eliminate it narrowly. For example, in the famous case of Ex parte McCardle, the Court upheld a statute withdrawing the 1867 grant of appellate jurisdiction in habeas corpus cases. 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1868). Less than a year later, the Court held that the repeal did not affect its original habeas jurisdiction under the 1789 Judiciary Act. Ex parte Yerger, 75 U.S. (8 Wall.) 85, 19 L.Ed. 332 (1868). Thus, the Court retained power to review cases like McCardle's through original writs of habeas corpus and certiorari.

[17] In the Nineteenth Century, the Court used the writ expansively in aid of its jurisdiction. *See, e.g.*, Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873); Ex parte Yerger, *supra*. The return of appellate jurisdiction in 1885 and the 1891 grant of review of federal criminal convictions reduced the use of the writ. *See* Oakes, *supra* note 17, at 181-82. The development of both the statuotry and common-law writs of certiorari has now made the original writ an "anachronism". *Id.* at 182-189, 206.

In this century, the Court apparently has granted an original writ only three times. Hart & Wechsler's The Federal Courts and The Federal System 1431 (2d ed. 1973); *see* Ex parte Grossman, 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527 (1925); Ex parte Hudgings, 249 U.S. 378, 39 S.Ct. 337, 63 L.Ed. 656 (1919); Matter of Heff, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905). Nevertheless, motions for leave to file original writs of habeas corpus still are filed, especially by prisoners, and its continued existence may be symbolic of the Supreme Court's role as the ultimate dispenser of justice in the federal system; between 1929 and 1961, 2,000 such motions were filed. Oaks, *supra* note 15, at 209-11. During the late 1950's and 1960's, the Court began treating the motion as a writ of certiorari. *Id.* at 201-06; *see, e.g.*, Carnley v. Cochran, 366 U.S. 958, 81 S.Ct. 1927, 6 L.Ed.2d 1253 (1961); Cheeks v. Maryland, 355 U.S. 929, 78 S.Ct. 415, 2 L.Ed.2d 413 (1958). The present Court apparently treats the motions as miscellaneous orders and denies them explicitly as motions for leave to file petitions for writs of habeas corpus. *See* note 18 *infra*.

[18] *See, e.g.*, Schwartz v. Nevada, 417 U.S. 906, 94 S.Ct. 2634, 41 L.Ed.2d 229 (1974); Black v. Attorney General, 416 U.S. 980, 94 S.Ct. 2413, 40 L.Ed.2d 776 (1974).

The exercise of original habeas corpus jurisdiction is ex-

Not surprisingly, a statute with such significant jurisdictional effects raises difficult constitutional questions. These constitutional issues—whether section 110(g) constitutes an improper suspension of the Great Writ and whether by singling out those convicted of local District of Columbia crimes for eliminating access to the article III courts Congress has violated the concept of equal protection of law—form the backdrop for our consideration of Congress' intent in enacting section 110(g). While we need not resolve these difficult questions now, a brief overview of these unique and perplexing problems is important to an understanding of our approach to construing the statute.

B

1. *The Suspension Clause*

Appellant's constitutional argument concerning the suspension clause, article 1, section 9, clause 2, is that it acts as a restraint upon Congress' control over the jurisdiction of the inferior article III courts, and that once Congress created those courts and vested them with habeas jurisdiction, it may only substitute a remedy "exactly commensurate" with the Great Writ. Section 110, appellant reasons, is

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tremely discretionary. *See, e.g.*, Ex parte Abernathy, 320 U.S. 219, 64 S.Ct. 13, 88 L.Ed. 3 (1943). 28 U.S.C. § 2241(b) empowers the Court to transfer the application to a district court with jurisdiction. The practice for the writ is governed by Supreme Court Rules 30 and 31.

not a commensurate remedy, and thus an unconstitutional suspension because the article III salary and tenure protections were not extended to Superior Court judges. To resolve these contentions would require us to pass directly upon fundamental and extremely prickly questions concerning the nature of the judicial system.

[6] Habeas corpus holds a unique position in our constitutional scheme. It is nowhere directly constitutionally endowed, but the Constitution, through the suspension clause, protects against its interference.

[7] This must be contrasted with Congress' authority to control the jurisdiction of the inferior article III courts. *See, e.g.*, Palmore v. United States, *supra*, 411 U.S. at 400-02, 93 S.Ct. 1670; Cary v. Curtis, 44 U.S. (3 How. 236, 244-45, 11 L.Ed. 576 (1845). Thus, Chief Justice Marshall could note on the one hand in Ex parte Bollman, S. U.S. (4 Cranch) 75, 93, 2 L.Ed. 554 (1807), "the power to award the writ by any of the courts of the United States, must be given by written law," and on the other state:

> It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it." Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; *for*

> *if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.* Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.

Id. at 95, 2 L.Ed. 554 (emphasis added). Hence, while it seems well-established that Congress, despite the suspension clause, possesses *some* control over habeas jurisdiction, *see, e.g.*, Craig v. Hecht, 263 U.S. 255, 271-73, 44 S.Ct. 103, 68 L.Ed. 293 (1923); Whitney v. Dick, 202 U.S. 132, 137, 26 S.Ct. 584, 50 L.Ed. 963 (1906), the question of whether Congress would violate the suspension clause by failing to grant power to issue the writ at all has been avoided.[19]

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[19] Appellant adopts, without real objection by the Government, a variant of this point as the premise to his suspension argument—the suspension clause requires Congress to empower at least one federal court to grant the writ. For example, absent the inferior federal courts, this view would dictate that the Supreme Court be empowered to grant the writ. *See, e.g.*, Appellant's Br. at 40-45; Reply Br. at 28-32.

Another question is whether the suspension clause, coupled with the fact that the Supreme Court is explicitly established by the Constitution, dictates a conclusion that Congress must endow the Court with some sort of habeas corpus or, despite the suggestion in *Bollman*, that the Court possesses nonstatutory authority to issue the writ. *See* Appellant's Br. at 42 n.34; Respondent's Memorandum of Law at 10 n.8 ("Jurisdiction of federal courts (*except the Supreme Court*) to issue writs of habeas corpus is surely statutory"). Thus, the plain meaning interpretation of the statute divesting the Supreme Court for the first time in our history of some of its "original" habeas jurisdiction would force us to enter into treacherous constitutional territory indeed.

This brings us to the crux of appellant's suspension clause argument—once the privilege to issue the writ in the inferior article III courts has been granted, Congress may not, consistent with the suspension clause, dilute or remove it. Appellant's Br. at 42; *see* Respondent's Br. at 29, United States v. Hayman, 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232 (1952) (Professor Freund). While conceding that the Supreme Court has not specifically endorsed this view, *see* Fay v. Noia, 372 U.S. 391, 406 n.15, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); United States v. Hayman, *supra*, 342 U.S. at 223, 72 S.Ct. 263, appellant contends that the Court has tacitly accepted it by requiring and then interpreting any attempted substitute to be "exactly commensurate" with the Great Writ.

The primary example is the Court's treatment of 28 U.S.C. § 2255 (1970), enacted in 1948 as a substitute for habeas corpus, and the statute upon which section 110 is based.[20] The Ninth Circuit held section 2255 to be an unconstitutional suspension of the writ. Hayman v. United States, 187 F.2d 456 (9th Cir. 1950). The Supreme Court disagreed and reversed because section 2255 was "intended to be as broad as habeas corpus" and simply "[afford] the same rights in another and more convenient forum." United States v. Hayman, *supra*, 342 U.S.

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[20] S.Rep. No. 91-405, 91st Cong., 1st Sess. 38 (1969); H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 117 (1970); *see* part C *infra*.

at 217, 219, 72 S.Ct. at 271.[21] In subsequent cases the Court expanded upon this interpretation. In Sanders v. United States, 373 U.S. 1, 11-12, 83 S.Ct. 1068, 1076, 10 L.Ed.2d 148 (1963) (citations omitted), the Court, interpreting the successive petition bar of 28 U.S.C. § 2244 and § 2255, noted that "if construed to derogate from the traditional liberality of the writ of habeas corpus, § 2244 might raise serious constitutional questions", and that section 2255 was intended to provide "a remedy exactly commensurate with that which had previously been available by habeas corpus. . . ." *Id.* at 14, 83 S.Ct. at 1076, *quoting* Hill v. United States, 368 U.S. 424, 427, 82 S.Ct. 468, 7 Ed.2d 417 (1962).

Palmore concludes that section 110 is not exactly commensurate to habeas corpus both because it is inadequate to protect the interests which mandate ultimate article III review of questions involving constitutional liberty and because it entrusts that task to judges who do not possess the tenure and salary protections which lie at the heart of the independence of the federal judiciary. Appellant opines that in our constitutional system ultimate protection of our constitutional liberties is entrusted to article III judges. Habeas jurisdiction in the inferior federal courts discharges that function and also serves to produce uniform constitutional interpretation be-

[21] The Court has subsequently stated that in *Hayman* it had "avoided the constitutional question by holding that § 2255 was as broad as habeas corpus." Sanders v. United States, 373 U.S. 1, 13, 83 S.Ct. 1068, 1076, 10 L.Ed.2d 148 (1963).

tween local and federal courts. Moreover, argues Palmore, article III judges were made the final arbiters of the Constitution because of their preferred position of detachment and freedom from local pressures and considerations, *see* Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), guaranteed by the article III salary and tenure provisions, which judges of the District of Columbia courts do not possess. Hence, section 110 is not an exactly commensurate remedy and represents an unconstitutional suspension of the writ.

The Government responds by emphasizing Congress' authority to control the jurisdiction of the federal courts and defends section 110 as a constitutional exercise of that congressional authority. It contests the assertion that Congress, once having vested the inferior article III courts with habeas jurisdiction, may not reduce it. Moreover, the Government contends that the principle to be derived from Brown v. Allen, *supra*, is a need for *federal* review of constitutional claims and that section 110, creating a remedy in what the Government repeatedly characterizes as a "*federal* court," meets that need; it rejects the suggestion that the *Brown* Court attached importance to the institutional protections accorded article III judges by referring to commentators who have judged that factor to be of only "limited" significance. Gov't Br. at 31, *incorporating* Gov't. Pressley Br. at 31; *see* Developments in the Law—Habeas Corpus, 83 Harv.L.Rev. 1038,

1060 (1970).[22] In addition, the Government asserts that *Palmore* mandates the rejection of appellant's argument concerning the importance of the tenure and salary provisions, emphasizing that Congress also took precautions to ensure the independence of the Superior Court judges. Gov't. Pressley Br. at 39 n.32, 41-43. Finally, the Government claims that the uniformity argument must be rejected since the Supreme Court stands ready by writ of certiorari to resolve potential conflicts between the two court systems.[23] *Id.* at 35-37.

[8] What emerges from these conflicting positions is the absence of a clear or simple resolution. We are not as confident as the Government of the controlling nature of the Supreme Court's *Palmore* decision. While the Court rejected the salary and tenure argument in upholding trial of District of Columbia Code offenses in Superior Court, it noted that "Palmore was no more disadvantaged and no more entitled to an Art. III judge than any other citizen of any of the 50 States who is tried for a strictly local

[22] The Government points out that while a forum for a "second and removed hearing" for a review of constitutional claims may well be necessary, it may be in the same court, referring to the section 2255 analogy. Gov't Pressley Br. at 34.

[23] The Government also asserts that even if we "should conclude that the Constitution requires review by an Article III court of a petitioner's constitutional claim raised on collateral attack, . . . the appellate review available in the Supreme Court on a writ of certiorari should satisfy such a requirement." *Id.* at 43.

crime," and explicitly stated "[w]e do not discount the importance attached to the tenure and salary provisions of Art. III. . . ." 411 U.S. at 410, 93 S.Ct. at 1682. Because of procedural and institutional limitations, reliance upon Supreme Court discretionary review as the sole protection of important interests may be both inadequate and impracticable. *See* Brown v. Allen, *supra*, 344 U.S. at 489-97, 73 S.Ct. 397; Freund, Symposium—Habeas Corpus, Proposals for Reform, 9 Utah L.Rev. 18, 27-28 (1964). Finally, while the Superior Court is undeniably a federal court in the sense it was *created* by Congress, it is not a federal court as *defined* by Congress in the Court Reform Act;[24] the significance, if any, of the distinction would have to be discerned.

However, adoption of appellant's argument would require recognition as constitutionally overriding of factors, the importance of which have only been hinted at previously. It would also demand delineating for the first time the boundaries of congressional control over federal jurisdiction *vis-a-vis* the suspension clause. Both parties recognize the unresolved nature of this question. Palmore concedes "the full meaning of the constitutional guarantee against the writ's suspension has never been fully explored," Appellant's Br. at 40; the Government "acknowledge[s] that this question is one of the first impression." Gov't Pressley

[24] The article III courts are defined as federal courts. The Superior Court and District of Columbia Court of Appeals are defined as District of Columbia courts. 11 D.C. Code § 101(1) (1973).

Br. at 30. In fact, one commentator has noted: "The suspension clause, so simple in appearance, is fraught with confusion. Those few cases which have dealt with it provide little interpretative guidance." Developments, *supra*, 83 Harv.L.Rev. at 1263.

This difficult question, along with the equal protection problem to which we now turn is a significant "variable" which compels us to reject the Government's "clear meaning" approach to the statute. *See* United States v. Universal C.I.T. Credit Corp., *supra*.

2. *Equal Protection*

Palmore's equal protection argument is straightforward. Since 28 U.S.C. §§ 2241 *et seq.* apply to every person in custody either by authority of the United States or in violation of the Constitution laws, or treaties of the United States, then, if the district court's interpretation of section 110(g) is upheld, the statute would deny prisoners convicted in the Superior Court equal protection as guaranteed by the due process clause of the fifth amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). Appellant places significant reliance upon our decision in United States v. Thompson, *supra*, 452 F.2d at 1338-41, where we found that 23 D.C.Code § 1325, if construed to be applicable to individuals convicted of federal crimes in district court, would deny them equal protection by treating prisoners in the District differently than those in every other district court whose motions for release pending appeal would be judged under the more lenient standards

of the Bail Reform Act, 18 U.S.C. § 3148 (1970). *See also* United States v. Hairston, 161 U.S.App.D.C. 466, 495 F.2d 1046 (1974); United States v. Henson, 159 U.S.App.D.C. 32, 486 F.2d 1292 (1973) (en banc); United States v. Brown, 157 U.S.App.D.C. 311, 483 F.2d 1314 (1973).

In response, the Government again points to Congress' broad power to legislate for the District of Columbia under article I, section 8, clause 17 and to the unique position of the District in our federal system. It also challenges the "fundamentalness" of the right appellant advances—collateral review in an article III court. It notes that Congress may draw distinctions among citizens so long as there is sufficient justification for the distinction and argues that the justification "virtually cries out from the legislative history of the Court Reorganization Act," the criminal backlog in the district court and the " 'crisis' of crime 'gripping' the city." [25] Finally, the Government attempts to distinguish the *Thompson* case by three methods. First, it argues that unlike appellant, Thompson stood convicted of federal offenses; second, it disputes *Thompson's* premise that "Congress cannot constitutionally create standards of treatment to be applied in the District of Columbia which differ from those applicable elsewhere" because the premise "seriously undermines and restricts the traditional plenary power of Congress under the Con-

[25] *See* Gov't Pressley Br. at 46, *citing* H.R. Rep. No. 91-907, *supra* note 20, at 25-27, 226; S. Rep. No. 91-405, *supra* note 20, at 2-3.

stitution 'to exercise exclusive Legislation in all Cases whatsoever' for the District of Columbia;" [26] and finally, it argues this case differs from *Thompson* because adoption of "appellant's argument threatens to destroy the constitutionally mandated powers of the legislative branch to serve as a check and balance on the judicial branch by controlling the latter's jurisdiction." [27]

The difficulty with Palmore's argument is to ascertain exactly what right the classification affects and what interest the Government must advance to justify the distinction. We have recognized "[t]he rights of a criminal defendant are in some sense the most basic of all, since what is at stake is no less than the freedom to be free." United States v. Thompson, *supra*, 452 F.2d at 1340. However, the alleged right that appellant is attempting to protect may be precisely defined as the guarantee to have his claim heard

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[26] Gov't Pressley Br. at 47-48. The Government further attempts to undercut the *Thompson* premise by asserting that it is in direct conflict with our previous decision in Sims v. Rives, 68 U.S.App.D.C. 24, 84 F.2d 871, cert. denied, 298 U.S. 682, 56 S.Ct. 960, 80 L.Ed. 1402 (1936), which held that equal protection as applied to the District of Columbia meant only that all persons within the District must be treated alike. However, the *Thompson* division distinguished and limited *Sims* to its facts, and hence that case can no longer be invoked for such a broad, general proposition. Moreover, assuming *arguendo* the validity of the principle the Government advances, there still exists a difficult equal protection problem concerning a classification of persons within the District. *See* notes 30-31 *infra* and accompanying text.

[27] Gov't Pressley Br. at 50.

in an article III court. As noted *supra*, the existence and extent of this right have never been fully delineated. Also unresolved is the question whether the Government must only demonstrate a rational basis for the classification, *see* Dandrige v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911), or if the right be deemed fundamental, a compelling interest. *See* Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); United States v. Thompson, *supra*.

[9] Despite these difficulties, we do not believe that appellant's argument can be disposed of as neatly as the Government purports. We are certainly aware of the *sui generis* position of the District of Columbia, *see, e.g.*, District of Columbia v. Carter, 409 U.S. 418, 432, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973), and of Congress' extensive power to legislate for the District [28] and to control the jurisdiction of the court systems it creates. However, Congress may not exercise its power, whether explicitly or implicitly derived from the Constitution, in a manner inconsistent with the limitations on government power contained elsewhere in that document. The *sui generis* nature

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[28] It is apparent that the power of Congress under clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under art. I, § 8. Palmore v. United States, *supra*, 411 U.S. at 397-98, 93 S.Ct. 1670.

of the District and Congress' legislative authority are not talismans which make appellant's equal protection argument disappear. *See* United States v. Thompson, *supra*, 452 F.2d at 1338.

[10] Moreover, while the overriding legislative purpose of the Court Reform Act seems clear—the reorganization of the administration of criminal justice in the District to help alleviate "soaring" crime rates—it is not so clear that section 110(g) is a means sufficiently related to the achievement of that legislative end to be constitutional. If the court reforms were "calculated to restore the spectre of certain justice, [and] the deterrent impact of speedy disposition," [29] that interest may have been fully effectuated by the transfer of *trial* jurisdiction to the Superior Court. The relation to the identified interest of divesting the district court of its habeas jurisdiction appears more tenuous.

Even if we accept the classification of treating District prisoners differently as related to a legitimate legislative goal, there is a similar second classification involving prisoners *within* the District which poses equal protection problems. Section 110(g), under the Government's theory, only divests the district court of jurisdiction to hear post-conviction writs; pre-trial petitions remain unaffected. Clearly the legislative end of prompt criminal disposition cannot justify this

[29] Statement of the Managers on the Part of the Senate Submitted Regarding the Conference Action Upon S. 2601, the President's Crime Legislation for the District of Columbia, 91st Cong., 2d Sess. 2 (1970).

distinction.[30] Indeed, we are uncertain whether *any* rational justification could be advanced for this classification.[31]

Thus, what emerges from this discussion is that the district court's interpretation of section 110(g) raises serious questions about the statute's constitutionality. We have noted that "the presumption of the constitutional validity of legislation enacted by Congress raises a corollary presumption that constructions calling statutes into serious constitutional question are erroneous and, in any event, are to be avoided whenever possible." United States v. Hairston, *supra*, 495 F.2d at 1052; *see* note 8 *supra*. Of course, if Congress clearly intended the construction which raises these questions of first impression, they may not be avoided. *See* United States v. Thompson, *supra*. However, to ascertain that congressional intent, we cannot don the interpretive "blinders" the Government offers, but must construe the statute only after reference to the legislative history behind it and behind the entire Act. We now turn to that inquiry.

[30] This argument is *not* the equivalent of a potential claim brought by a federal post-conviction prisoner challenging 28 U.S.C. § 2255. The above complaint is not directed at venue or at the type of remedy available (since section 2255 has been held to be the equivalent of habeas corpus) but at the nature and characteristics of the forum available to hear the complaint.

[31] It is perhaps significant that at the time this legislation was enacted, the *Younger* v. *Harris* line of cases did not exist, and the controlling law was Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) and its progeny.

C.

The legislative history concerning section 110 is sparse. The Senate Committee Report stated:

> *Section 23-110* is new. Rather than relying on the inherent power of the superior court to review judgments of conviction, the new section provides statutory procedures for post-conviction challenges. Section 23-110 is modeled upon 28 U.S.C. section 2255 with only the necessary technical changes.

S.Rep.No.91-405, 91st Cong., 1st Sess. 38 (1969); *see* H.R.Rep.No.91-907, 91st Cong., 2d Sess. 117 (1970). Nowhere in the committee reports, nor in the congressional floor debates is there an explicit reference or even a suggestion that section 110 was to have the jurisdictional impact that the district court accorded it. In contrast, the existing brief legislative history indicates a different, but clear and logical legislative purpose behind section 110.

[11] Section 110 is "modeled upon 28 U.S.C. section 2255," which was enacted in 1948 for reasons that have been fully explored in previous court opinions, *e.g.*, Hill v. United States, supra, 368 U.S. at 427-28, 82 S.Ct. at 471-72; United States v. Hayman, *supra*, 342 U.S. at 210-224, 72 S.Ct. 263, and need only be summarized here. Before 1948 post-conviction petitioners for habeas corpus were normally filed in the district where the prisoner was confined, and hence the five districts where federal prisons were located received the bulk of these cases. 342 U.S. at 213-14 & n.18, 72 S.Ct. 263, *citing* Speck, Statistics

on Federal Habeas Corpus, 10 Ohio St.L.J. 337 (1949).[32] In response to this problem and after receiving the recommendation of the Judicial Conference of the United States, Congress eventually enacted 28 U.S.C. § 2255, authorizing a new remedy in the sentencing court "intended to be as broad as habeas corpus." *Id.* at 213-17, 72 S.Ct. at 271. The statute has been construed to be exactly commensurate with the Great Writ, and its principal effect has been to act as an equalizing venue provision for post-conviction pleas for collateral relief."[33]

In 1949, section 2255 was amended to apply to any "court established by Act of Congress," 63 Stat. 105 (1949), primarily to include within its scope the federal territorial courts. *See* United States ex rel. Leguillou v. Davis, 212 F.2d 681 (3rd Cir. 1954). However, while the local District of Columbia courts were generically courts created by "Act of Congress," the Municipal Court of Appeals held in Burke v. United States, 103 A.2d 347 (D.C.Mun.App. 1954) and Ingols

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[32] The housekeeping problem was exacerbated by the fact that the records of the sentencing court, which could be a great aid in disposing of the petition, were not readily available to the habeas corpus court. United States v. Hayman, *supra*, 342 U.S. at 212-13, 72 S.Ct. 263.

[33] The Government disputes the characterization of the net effect of section 2255 as to be a venue provision. *See* Gov't. Br. at 17 n.14. Its argument appears undercut by the Supreme Court's constant reminder that section 2255 must be treated as *exactly commensurate* with the Great Writ. *See also* Kaufman v. United States, 394 U.S. 217, 221, 89 S.Ct. 1068, 1071, 22 L.Ed.2d 227 (1969) ("Section 2255 revised the procedure . . . but did not in any respect cut back the scope of the writ").

v. District of Columbia, 103 A.2d 879 (D.C.Mun. App. 1954) that they did not fall within the statute. Notably, *Burke* and *Ingols* did provide a collateral remedy by holding that the local courts had inherent common law power to entertain a motion to vacate a sentence. *Id.* at 880; 103 A.2d at 350-51.

[12] From this discussion and the fact that the Senate Report tracks the language of the *Burke* and *Ingols* opinions, the one explicit legislative intent behind section 110 becomes clear; rather than leaving the new local courts to rely once again upon their inherent authority, Congress provided a detailed statutory remedy. Quite naturally, as a model, Congress drew upon the statutory remedy previously created for the federal courts to alleviate a different problem.[34]

[13] In sum, the district court construed a statute which *created* a statutory remedy for post-conviction relief in the new court system as *eliminating* by implication a remedy which the inferior article III courts and the Supreme Court have exercised for two hundred years. Of course, repeals by implication, especially of jurisdictional statutes, are disfavored. *See, e.g.*, Lynch v. Household Finance Corp., 405 U.S. 538, 549, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972). As the Court recently stated, "this canon of construction

[34] The Superior Court does not have a problem of disproportionate allocation of petitions between courts such as the federal one which prompted section 2255.

As the Government has noted, Congress had before it extensive jurisprudence concerning section 2255 and thus knew it was using as a model an effectively "exactly commensurate" remedy.

applies with particular force when the asserted repealer would remove a remedy otherwise available." Schlesinger v. Councilman, —— U.S. ——, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975). Nevertheless, the Government argues the intent to repeal jurisdiction is evidenced by the "only necessary technical changes" language in the committee reports: "[t]he 'necessary technical changes' referred to in the legislative history were those changes 'necessary' to insure that a collateral attack on a conviction in the Superior Court could be entertained only in that court. . ." Gov't Br. at 24. That this argument is advanced by a party who is imploring us to adopt a plain meaning approach to the statute may strain credulity. We reject the assertion that the alleged jurisdictional effects can be described as merely technical changes, and conclude that no support for the district court's interpretation can be found in the legislative history behind section 110.[35]

[14] Several other indicia of congressional intent add credence to appellant's contention that Congress did not intend section 110(g) to affect the jurisdic-

[35] Our rejection of the Government's interpretation of this language is buttressed by the lack of debate over its effect and constitutionality. *See* notes 41-43 *infra* and accompanying text.

We also note that the commentators have split on the question before us. *Compare* Rauh & Silbert, Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970, 20 Am.U.L.Rev. 252 (1971) *and* Williams, District of Columbia Court Reorganization, 1970, 59 Geo.L.J. 477 (1971) *with* Smalls, Habeas Corpus in the District of Columbia, 24 Cath. U.L.Rev. 75 (1974).

tion of the article III courts. First, as part of the reorganization generated by the Court Reform Act, Congress amended title 28 of the United States Code to bring that title, Judiciary and Judicial Procedure, into conformity with the new court system. Congress added 28 U.S.C. § 292(c) to provide for temporary assignment of district court judges to serve as judges of the Superior Court; amended 28 U.S.C. § 1257 to include the District of Columbia Court of Appeals within the term "highest court of a State" for purposes of rules of review to the Supreme Court by appeal or certiorari; and amended 28 U.S.C. § 1869(b) to include the Superior Court within the scope of the term "district court" for purposes of parts of the Federal Jury Act.[36] In contrast, 28 U.S.C. § 2241 was not amended to reflect the partial divesture of jurisdiction allegedly enacted in section 110(g).[37] While certainly not dispositive,[38] we be-

[36] Section 172 also added 28 U.S.C. § 1451 to include the District of Columbia Courts within the provision for removal of cases from state courts and 28 U.S.C. § 1363 to exclude laws applicable exclusively to the District of Columbia from the chapter on district court jurisdiction and amended 28 U.S.C. § 2113 to include the District of Columbia Court of Appeals within the terms "state court", "State Courts", and "highest court of a State" for purposes of the chapter on procedural provisions concerning Supreme Court review.

[37] Such an amendment would not be unreasonable for as matters now rest, an alleged modification to jurisdiction codified in the United States Code is only codified in the District of Columbia Code.

[38] The Government offers two arguments which it contends undercuts the significance of this. First, the Government notes

lieve this is further evidence that Congress never intended to affect the federal courts' jurisdiction, especially in light of the evident care with which Congress legislated and the ease with which an express amendment could have been effectuated. *Cf.* Palmore v. United States, *supra*, 411 U.S. at 395, 93 S.Ct. 1670.

[15] Perhaps a more significant indicium is the obvious relationship between section 110 and a strong legislative purpose of the Court Reform Act, apparent from both the face of the Act and its legislative history—the establishment of a dual court system analogous to the relationship between the federal and state courts. This reorganization goal is abundantly clear in the legislative history. The Senate Committee Report states:

that when Congress enacted section 2255, it failed to amend the newly consolidated section 2241 to reflect the new remedy. Gov't Pressley Br. at 14-15. However, section 2255 was itself an amendment to and included in the habeas chapter of title 28.

Second, the Government asserts that when Congress amended 16 D.C.Code § 1901, it did not amend 28 U.S.C. § 2241 despite the fact "[t]here is no question that [section 1901] also acted to restrict the normal habeas corpus jurisdiction of the District Court." *Id.* at 15. Contrary to the Government's opinion, we have held that section 1901 does not affect the normal jurisdiction of the district court here. McCall v. Swain, 167 U.S.App.D.C. ——, 510 F.2d 167, 177 (1975).

In sum, we do not find that either of the Government's arguments undercut the point advanced above, which is conjunction with the other legislative history we discuss, dictate the result we reach.

> This transfer [of jurisdiction to the Superior Court] will bring the jurisdiction of the U.S. courts in the District of Columbia in line with the jurisdiction exercised by the Federal courts in the several States, and will give the local courts jurisdiction over all purely local matters.

S.Rep. No. 91-405, *supra*, at 5. The House Report similarly notes:

> Upon completion of the three stages of transfer of jurisdiction the United States District Court for the District of Columbia will be on a par with other United States district courts, exercising federal jurisdiction only, and the Superior Court of the District of Columbia will have all purely local jurisdiction.
>
> * * * * *
>
> The jurisdictional changes . . . will result in a Federal-State court system in the District of Columbia analogous to court systems in the several States.

H.R.Rep. No. 91-907, *supra*, at 34-35.

In cases dealing with the Court Reform Act and the District, the courts have recognized this legislative purpose. The Supreme Court has repeatedly invoked the federal-state analogy, *see* Pernell v. Southall Realty, *supra*, 416 U.S. at 367, 94 S.Ct. 1723; Palmore v. United States, *supra*, 411 U.S. at 408-09, 93 S.Ct. at 1681-82, and this court has noted that the "overriding purpose which emerges from the Act is to put the District's judicial system on a par with those of the states." United States v. Thompson, *supra*, 452 F.2d at 1342.

The interpretation of section 110 most harmonious with this federal-state analogy is clearly appellant's, which would allow the district court to entertain petitions for collateral review in the same manner as district courts do for the fifty states. In fact, it would not be inaccurate to state that the district court's holding is flatly inconsistent with this congressional purpose. Nowhere is there any indication that the federal-state analogy was subject to certain jurisdictional exceptions or that the district court here would possess less jurisdiction than in other districts.[39] In fact, 11 D.C.Code § 501 (1973) defines the civil jurisdiction of the district court, which includes habeas corpus, by initially stating that "[i]n addition to its jurisdiction as a United States district court." The only construction of section 110 consistent with this analogy is that Congress never intended to affect the district court's habeas jurisdiction.

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[39] The Government argues that the legislative history reveals "that the United States District Court for the District of Columbia would no longer be burdened with so much business of a purely local nature, *not that the court would henceforth have precisely the same judisdiction.*" Gov't Br. at 29 (emphasis added). We must reject this latter suggestion because we believe it flies in the face of clear legislative history and consistent contrary court interpretations. In fact, we are surprised that the Government seriously advances it when it even quotes from the Senate Conference Managers:

> the Federal district court for the District of Columbia is to regain its rightful status as a Federal tribunal, devoted on a fulltime basis to Federal business, like all other United States district courts.

Statement, *supra* note 29, at 5.

To blunt this conclusion, the Government maintains that section 110(g) effectuates another, even more overriding, function of court reform, the elimination of jurisdiction over local matters in order to help alleviate the soaring District crime rate through swifter justice. In this regard, section 110 implements this purpose by "eliminat[ing] from the caseload of the District Court the large number of habeas corpus petitions that could potentially be brought by those convicted in the Superior Court and provid[ing] an alternative forum for the resolution of these claims." Gov't. Br. at 29. We disagree; these congressional purposes do not dictate the result the Government suggests, nor do we believe that to construe the statute as not affecting federal jurisdiction is inconsistent with these purposes.

[16] Certainly a primary purpose of the Court Reform Act was to remove local matters from the federal courts, especially the trial of local crimes. As the House Report states, "[t]he fundamental reason for reorganization of the District of Columbia courts is the soaring crime rate." H.R.Rep. No. 91-907, *supra*, at 25. The Senate Committee Report notes the anomaly "inherent in burdening a Federal district court with sole general jurisdiction over the full panoply of local legal matters. The burden is acute in the District of Columbia, the seat of the Federal Government, where . . . a substantial and greater quantum of genuinely Federal litigation might best and conveniently be brought." S.Rep. No.

91-405, *supra*, at 3. Perhaps the best explication of of what Congress was attempting to accomplish was Justice White's in *Palmore*:

> Congress had concluded that there was a crisis in the judicial system of the District of Columbia, that case loads had become unmanageable, and that neither those matters of national concern nor those of strictly local cognizance were being promptly tried and disposed of by the existing court system. The remedy in part, was to relieve the regular Art. III courts, that is, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city and to confine the work of those courts to that which, for the most part, they were designed to do, namely, to try cases arising under the Constitution and the nationally applicable laws of Congress. The other part of the remedy, equally essential, was to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 states of the Union with responsibility for trying and deciding those distinctively local controversies that arise under local law including local criminal laws having little, if any, impact beyond the local jurisdiction.

411 U.S. at 408-09, 93 S.Ct. at 1682.

We think that this Congressional purpose has been fully carried out by the transfer of jurisdiction over

local crimes to Superior Court. *See, e.g., Washington Post*, Apr. 20, § B, p. 1, col. 7. The transfer of trial jurisdiction effectuates the goal of swift justice; the question of post-collateral relief does not affect that process at all.[40] More importantly, the fourth amendment claim appellant advances is not a "purely local matter;" it is a case arising under the Constitution, a matter to which our citizens have always had recourse to the article III courts. Congress, in delineating the purposes behind Court Reform, carefully distinguished between "local" and "federal" business, and appellant's construction of section 110 is harmonious with that congressional scheme.

We find one final indicium of legislative intent. As we have seen, the legislative history contains no debate or discussion of section 110's considerable jurisdictional impact or its possible unconstitutionality. In contrast, proposals in recent years which would affect the habeas jurisdiction of the Federal courts have sparked considerable debate and controversy concerning both their desirability and constitutionality.

In 1968, Congress had before it, as part of a crime control act, a proposed statute, the intended effect of which was to eliminate post-conviction federal habeas

[40] This conclusion is reinforced by the fact that all parties concede that Congress did not divest the district court's authority to entertain pre-trial writs.

relief for state prisoners.[41] The extensively debated proposal was opposed upon constitutional grounds,[42]

[41] *See* 114 Cong.Rec. 11186 (1968). Section 702 of the bill, which would have added to title 28 of the United States Code, section 2256 to read:

> The judgment of a court of a State upon a plea or verdict of guilty in a criminal action shall be conclusive with respect to all questions of law or fact which were determined, or which could have been determined, in that action until such judgment is reversed, vacated, or modified by a court having jurisdiction to review by appeal or certiorari such judgment; and neither the Supreme Court nor any inferior court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to reverse, vacate, or modify any such judgment of a State court except upon appeal from, or writ of certiorari granted to review, a determination made with respect to such judgment upon review thereof by the highest court of the State having jurisdiction to review such judgment.

id. at 11189.

[42] Senator Joseph Tydings, a leading opponent of the bill, solicited and introduced the views of 212 legal scholars from 43 law schools on the constitutional issues involved. *See* 114 Cong. Rec. 13850-13867 (1968). Senator Tydings delivered an extensive speech on the Senate floor on those issues, and was engaged in debate specifically focusing on the proposal's constitutional vitality. Id. at 13990-97. *See also id.* at 14136-37. Perhaps the most adamant constitutional viewpoint advanced was Minority Leader Scott's:

> If Congress tampers with the great writ, its action would have about as much chance of being held constitutional as the celebrated celluloid dog chasing the asbestos cat through hell.

id. at 14183.

It is noteworthy that Senator Tydings, a leading constitutional opponent of the proposed 1968 changes, was a prime

and apparently was dropped for that reason. *See* 119 Cong.Rec. 2221 (1973) (Remarks of Sen. Hruska). In 1973, another bill was introduced affecting federal habeas jurisdiction. *See* S. 567, 93rd Cong., 1st Sess. (1973). *See generally* Note, Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation? 61 Geo.L.J. 1221 (1973). Once again, the constitutional considerations were extensively set out.[43]

[17] We find the congressional silence, when contrasted with the extended constitutional debates over other proposals, both "curious"[44] and significant.

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advocate for the Court Reform Act, serving as Chairman of the Senate Committee on the District of Columbia and presiding at hearings which eventually lead to the Act. Hearings on § 1066 Before the Senate Comm. on the District of Columbia and the Senate Subcomm. of the Comm. on the Judiciary, 91st Cong., 1st Sess., pt. 3 at ii, 467 (1969).

[43] *See* 119 Cong.Rec. 2220-2247 (1973). The bill would have limited federal post-conviction review to cases involving a claimed constitutional violation which "presents a substantial question," which was not and could not be raised in a state proceeding, which "has as its primary purpose the protection of the reliability of . . . the fact finding process," and which probably would have produced a different result if the violation had not occurred. Section 2255 would have been similarly amended. *Id.* at 2222.

[44] "Is there any point to which you would wish to draw my attention?"

"To the curious incident of the dog in the night-time."
The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes.

A. Doyle, *Silver Blaze, The Complete Sherlock Holmes,* 347 (1930).

While these other proposals would have affected more prisoners than section 110, the district court's interpretation of that statute more completely eliminated article III review of District prisoners' claims. The most logical inference which may be drawn from this silence is that Congress never intended section 110 to affect the district court's jurisdiction.

We have failed to discern even a glimmer of legislative history to support the view that Congress intended to effectuate a substantial reduction in jurisdiction and to take us to the constitutional frontiers which have heretofore remained, perhaps deliberately, undefined. In Brown v. Allen, *supra,* the Supreme Court rejected a contention that Congress intended 28 U.S.C. § 2254 to eliminate the right of a state prisoner to apply for habeas relief in the lower federal courts, stating: "We are unwilling to conclude without a definite congressional direction that so radical a change was intended." 344 U.S. at 450, 73 S.Ct. at 404. As the Court said in another situation:

> We are asked to conclude that Congress, . . . without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change, nevertheless, by failing to alter the identifying words of [the operative statute], . . . has radically modified a statute always theretofore maintained and considered as of great importance. It is inconceivable that a rule in force from the beginning of the government, a part of our history as well as our law, welded into the structure of our national policy by a century of legislative and administrative acts

> and judicial decisions, would have been deprived of its force in such dubious and casual fashion.

Ozawa v. United States, 260 U.S. 178, 194, 43 S.Ct. 65, 68, 67 L.Ed. 199 (1922). We endorse those sentiments here.

D

[18] There is one remaining indication that we are on firm ground in our approach to the statute: the Supreme Court's treatment of cases which raised the spectre that recourse through habeas corpus to the article III courts to test the legality of detention would not be available. In each case, the Court has rejected such a construction of the relevant statute. We have already noted the Court's refusal to accept an interpretation of 28 U.S.C. § 2254 which would have permanently consigned constitutional claims of state prisoners to the state courts, *see* Brown v. Allen, *supra* and its avoidance of the problem for 28 U.S.C. § 2255 by holding that section to be exactly commensurate to habeas corpus. *See* Sanders v. United States, *supra*; United States v. Hayman, *supra*. Another example of the Court's approach is its treatment of the immigration laws. Time and again, the Court faced statutes which made executive determinations final, did not provide for judicial review, and could be construed to repeal the federal court's habeas jurisdiction.[45] In every case,

[45] *See* Act of May 6, 1882, 22 Stat. 58, as amended, Act of July 5, 1884, 23 Stat. 115. *See also* Act of March 3, 1891, 26 Stat. 1085:

[Footnote continued on page 43a]

the Court found jurisdiction. *See* The Japanese Immigrant Case, 189 U.S. 86, 23 S.Ct. 611, 47 L.Ed. 721 (1903);[46] United States v. Jung Ah Lung, 124 U.S. 621, 8 S.Ct. 663, 31 L.Ed. 591 (1888).[47] *See also* Chin Yow v. United States, 208 U.S. 8, 28 S.Ct. 201, 52 L.Ed. 369 (1908).

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[45] [Continued]

> All decisions made by the inspection Officers or their assistants touching the right of any alien to land, when adverse to such right, *shall be final* unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury.

(emphasis added); 28 Stat. 390 (1894):

> In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, *shall be final*, unless reversed on appeal to the Secretary of the Treasury.

(Emphasis added).

[46] In this case, the Court noted: "An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with . . . absolute and arbitrary power . . . ." The Japanese Immigrant Case, 189 U.S. 86, 101, 23 S.Ct. 611, 615, 47 L.Ed. 721 (1903).

[47] In this case, it was argued that the right to issue the writ "was taken away by the Chinese restriction act, which regulated the entire subject-matter, and was necessarily exclusive." United States v. Jung Ah Lung, 124 U.S. at 626, 8 S.Ct. at 666. The Court, however, concluded: "We see nothing in these acts which in any manner affects the jurisdiction of the courts of the United States to issue a writ of *habeas corpus*." *Id.* at 628-29, 8 S.Ct. at 666.

Perhaps the most relevant analogy involves the military justice system, created, like the local District of Columbia courts, pursuant to Congress' article I powers. The inferior article II courts traditionally have had habeas jurisdiction over persons detained by authority of the military justice system. *See, e.g.*, Ex parte Reed, 100 U.S. 13, 25 L.Ed. 538 (1879). In 1948, Congress enacted a collateral attack remedy within the military justice system itself. 62 Stat. 639 (1948). The statute stated that these collateral attack proceedings were "final and conclusive" and "binding upon *all* departments, *courts*, agencies, and officers *of the United States*." This provision, as easily as section 110(g), could be read to preclude further resort to the article III courts. However, faced with this construction and the complementary argument that it resulted in suspension of the Writ, the Court in Gusik v. Schilder unanimously held:

> We read the finality clause . . . as doing no more than describing the terminal point for proceedings within the court-martial system. If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable. The finality language so adequately serves the more restricted purpose [of exhaustion] that we would have to give a strained construction in order to stir the constitutional issue that is tendered.

340 U.S. 128, 132-33, 71 S.Ct. 149, 152, 95 L.Ed. 146 (1950) (footnote omitted). This language is equally applicable here.

E

[19] In light of our analysis in this part of the opinion, we reject the district court's and the Government's construction of section 110 as unsupported by the specific legislative intent behind the section and the general purposes behind the Court Reform Act. Recognizing that courts should interpret statutes to avoid difficult constitutional questions and that the constitutional questions raised are both novel and difficult, and that the Supreme Court has repeatedly avoided this problem by construing statutes not to affect jurisdiction, we find that Congress never intended to, nor does section 110 actually, affect the district court's jurisdiction to entertain post-conviction habeas petitions from local prisoners. Instead, we hold that section 110(g) is an exhaustion of remedies statute, requiring initial submission of claims to the local courts and marking, as did the statute in Gusik, the terminal point for proceedings in the local court system. This construction is consistent with the statute, the state court analogy for the Superior Court, *see* 28 U.S.C. § 2254(b), (c) (1970); Fay v. Noia, *supra*, 372 U.S. at 418-20, 83 S.Ct. 822, and federal habeas review of custody imposed by article I courts. *See* Noyd v. Bond, 395 U.S. 683, 693-94, 89 S.Ct. 1876, 23 L.Ed. 631 (1969); Gusik v. Schilder, *supra*, 340 U.S. at 131-32, 71 S.Ct. 149.

III

Having determined that the district court may entertain petitions brought by prisoners convicted in Superior Court, the question still remains whether appellant properly may maintain his petition at this time. We hold that Palmore properly invoked jurisdiction under 28 U.S.C. § 2241(c)(3) and has sufficiently exhausted his local remedies to maintain his petition.

28 U.S.C. § 2241(c) reads in part:

> The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;
>
> * * * * *

[20, 21] Palmore is released on bail, *see* note 3 *supra*, which constitutes custody within the meaning of section 2241. *See* Hensley v. Municipal Court, 411 U.S. 345, 348-53, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973); United States ex rel. Russo v. Superior Court, 483 F.2d 7, 12 (3d Cir.), cert. denied, 414 U.S. 1023, 94 S.Ct. 447, 38 L.Ed.2d 315 (1973). His application for the writ alleged, *inter alia*, that he is in custody in violation of the fourth amendment of the Constitution, a recognized basis for collateral relief. 28 U.S.C. § 2241(c) (1970); Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed. 2d 227 (1969).

[22-24] The final issue is whether appellant has exhausted his local remedies as required by section 110(g). Toward that end, we may usefully draw upon the principles of comity which have emerged from the exhaustion of state remedies requirement, now codified in 28 U.S.C. § 2254.[48] Applying these principles, we think that Palmore has sufficiently exhausted his local remedies despite not having made a motion under section 110. The fourth amendment issue was fully tendered to the Superior Court and the District of Columbia Court of Appeals; those courts fully considered and rejected the claim. The exhaustion requirement does not require prisoners to make futile gestures. "[O]nce the federal claim has been fairly presented to the [local] courts, the exhaustion requirement is satisfied." Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed. 2d 438 (1971); *see* Francisco v. Gathright, 419 U.S. 59, 63, 95 S.Ct. 257, 42 L.Ed.2d 226 (1974); Wilwording v. Swenson, 404 U.S. 249, 250, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971); Roberts v. LaVallee, 389 U.S. 40, 42-43, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967); Brown v. Allen, *supra*, 344 U.S. at 447-

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[48] Applying those principles furthers the federal-state analogy behind the Court Reform Act. *See* note 39 *supra* and accompanying text. In fact, not applying the same exhaustion requirements to local District of Columbia prisoners would raise severe equal protection problems. *See* notes 25-31 *supra* and accompanying text. The Government implicitly recognizes this by conceding "there may well be some question as to whether" Palmore need exhaust further remedies. Gov't Br. at 31.

50, 73 S.Ct. 397. Thus, appellant's application for the writ is timely, and he is entitled to consideration on the merits by the district court.[49]

In conclusion, we emphasize what we do and do not hold today. We hold that section 110(g) does not affect article III habeas jurisdiction. We do so after concluding that Congress never intended that result; if our interpretation is erroneous, Congress stands available to enlarge upon or clarify the statute. *See* Border Pipe Line Co. v. FPC, 84 U.S.App.D.C. 142, 171 F.2d 149 (1948). We reach no decision on the constitutional issues raised here; while their substantiality affected our consideration of the statute, demarcation of the extent of the constitutional restraints that the equal protection guarantee and the supension clause impose upon Congress' power to allocate jurisdiction must await the day Congress more explicitly asserts that power.

[25] Lastly, we do not believe that our decision thrusts the federal courts into a supervisory role over the local courts of the District of Columbia, nor does it upset the reorganization Congress established in the Court Reform Act. All claims must be presented in the first instance to the local courts. Those judges, who also swear to uphold the Constitution, undoubtedly can and will vindicate the

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[49] Appellant urges us to reach the merits of his petition. Appellant's Br. at 48-50. We do not believe the interests of justice require the extraordinary course of *de novo* consideration of the merits by this *en banc* court and instead remand the case.

rights of the District's citizens. We merely reaffirm that if the local courts withhold effective remedy, the federal courts have the power and the duty to provide it.

The judgment of the district court is reversed and the case remanded for consideration on the merits.

So ordered.

ROBB, Circuit Judge (dissenting):

The majority concludes that 23 D.C. Code § 110 (g) (1973) is merely an exhaustion of remedies requirement and was not intended by Congress to affect the habeas corpus jurisdiction of the federal courts. I am unable to accept this conclusion. Subsection (g) of section 110 provides that "[a]n application for a writ of habeas corpus . . . *shall not be entertained . . . by any Federal . . . court* if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." [Emphasis supplied.] Without laboring the point, I think this plain language means exactly what it says.

Since I reject the premise upon which the majority avoids what it considers to be difficult constitutional questions I turn briefly to those questions.

The majority suggests that there may be merit in the argument "that section 110 is not exactly com-

mensurate to habeas corpus both because it is inadequate to protect the interests which mandate ultimate article III review of questions involving constitutional liberty and because it entrusts that task to judges who do not possess the tenure and salary protections which lie at the heart of the independence of the federal judiciary." I note that the relief available in the Superior Court under 23 D.C. Code § 110 (1973) is the equivalent of that available in a federal court under 28 U.S.C. § 2255; and the Supreme Court has held that the scope of 28 U.S.C. § 2255 is "exactly commensurate" with the scope of federal habeas corpus. Sanders v. United States, 373 U.S. 1, 13-14, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); Hill v. United States, 368 U.S. 424, 427, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962). *See* United States v. Hayman, 342 U.S. 205, 209, 72 S.Ct. 263, 96 L.Ed. 232 (1952). The relief defined in section 110, therefore, is the equivalent of federal habeas corpus relief. Consequently, the basis for the argument that "section 110 is not exactly commensurate to habeas corpus" is reduced to the difference in the tenure and salary protections accorded District Court and Superior Court judges.

I think the argument suggested by the majority is answered in principle by Palmore v. United States, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973). In that case the Supreme Court held that a defendant charged with a felony under the District of Columbia Code may be tried by a judge who does not have tenure and salary protection under Article III of the Constitution; that "under its Art. I, § 8, cl.

17, power to legislate for the District of Columbia, Congress may provide for trying local criminal cases before judges who, in accordance with the District of Columbia Code, are not accorded life tenure and protection against reduction in salary." 411 U.S. at 390, 93 S.Ct. at 1672. If without the dilution of his constitutional rights a man may be tried and sentenced to the penitentiary by an Article I judge of the Superior Court, I see no reason why he may not be limited to that same court when applying for collateral post-conviction relief. A prisoner's constitutional rights are no more diluted and he is no more disadvantaged in the one case than in the other. In both cases review may be had in the United States Supreme Court. The Article I courts held competent to administer the District of Columbia's criminal justice system exclusive of Article III courts are perforce competent to dispense collateral post-conviction relief exclusive of the habeas corpus jurisdiction of Article III courts.

The majority also suggests that section 110(g) as construed by the government, may deny a prisoner convicted in the District of Columbia court equal protection of the law by prohibiting collateral review in an Article III court, a remedy available to all prisoners convicted in state courts. Once more I think Palmore v. United States, 411 U.S. at 410, 93 S.Ct. 1670, answers the argument. As the *Palmore* decision establishes, there is no invidious discrimination when a person in the District of Columbia is tried in an Article I court for a violation of an act of Con-

gress, applicable only within the District, although elsewhere in the United States he would be tried in an Article III court for any violation of a general federal statute. I think it follows that it is not a denial of equal protection when that person is required to present his application for collateral relief to an Article I District of Columbia court. Again, equal protection is denied no more in the one case than in the other. United States v. Thompson, 147 U.S.App.D.C. 1, 452 F.2d 1333 (1971), cert. denied, 405 U.S. 998, 92 S.Ct. 1251, 31 L.Ed.2d 467 (1972), relied upon by the appellant, does not require a contrary conclusion. In that case, as the majority here notes, the standards for release on bail under the District of Columbia statute were harsher than those of the Federal Bail Reform Act. In the case before us however the District of Columbia courts will be governed by the same standards applicable in federal Article III courts; and any improper deviation from such standards will be subject to correction by the Supreme Court of the United States.

I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1832

September Term, 1974

Habeas Corpus 31-73

ROOSEVELT F. PALMORE, APPELLANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
ET AL.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB and WILKEY, Circuit Judges, sitting *en banc*

JUDGMENT

This cause came on to be heard by the Court sitting *en banc* and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court *en banc* that the judgment of the District Court appealed from in this cause is hereby reversed and

this case is hereby remanded to the District Court, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Date: July 9, 1975

Opinion for the Court filed by Circuit Judge Tamm.

Dissenting opinion filed by Circuit Judge Robb.

[Filed Jul. 9, 1975, United States Court of Appeals for the District of Columbia, Hugh E. Kline, Clerk]

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROOSEVELT F. PALMORE, PETITIONER

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., RESPONDENT

[Filed Jul. 15, 1974, James E. Davey, Clerk]

Habeas Corpus No. 31-73

ORDER DISCHARGING RULE TO SHOW CAUSE AND DISMISSING PETITION

Upon consideration of the application for a Writ of Habeas Corpus filed herein, the Order to Show Cause, the return and answer of respondents, the several memorandums of law filed by the parties and the arguments of counsel, and it appearing to the Court that Congress has deprived this Court of jurisdiction by providing in 23 D.C. Code § 110(a) that post-conviction collateral attack upon convictions in the Superior Court of the District of Columbia may be made by motion in that court, and by directing in § 110(g) that

> "An application for a writ of habeas corpus in behalf of a prisoner who was authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the

applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by law is inadequate or ineffective to test the legality of his detention"

and it further appearing that the applicant herein is authorized by Title 23, D.C. Code § 110(a) to apply for relief by motion . t has failed to do so, and it further appearing that there is no showing that the Superior Court has denied him relief or that the remedy by motion is inadequate and ineffective to test the legality of his detention, it is by the Court this 10th day of July, 1974,

ORDERED, that the Rule to Show Cause be, and the same hereby is, discharged and the Petition for a Writ of Habeas Corpus is dismissed.

/s/ Joseph C. Waddy
JOSEPH C. WADDY
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

No. 73-1975

JASPER C. PRESSLEY, APPELLANT

v.

C. L. SWAIN

Argued April 24, 1975.

Decided July 9, 1975.

Appeal from the United States District Court for the District of Columbia

(D.C. Habeas Corpus 30-73)

Mark W. Foster, Washington, D.C. (appointed by this Court), for appellant in No. 73-1975. Robert M. Weinberg, Washington, D.C. (appointed by this Court), entered an appearance for appellant in No. 73-1975.

Albert H. Turkus, Asst. U.S. Atty., with whom Earl J. Silbert, U.S. Atty., John A. Terry, Warren R. King, Craig M. Bradley, and Tobey W. Kaczensky, Asst. U.S. Attys., were on the brief for appellee.

Before BAZELON, Chief Judge, and WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB and WILKEY, Circuit Judges, sitting en banc.

Opinion for the Court filed by Circuit Judge TAMM.

TAMM, Circuit Judge:

Along with Palmore v. Superior Court, —— U.S. App.D.C. ——, 515 F.2d 1294, this case considers whether 23 D.C.Code § 110(g) (1973) eliminates the habeas corpus jurisdiction of the United States District Court for the District of Columbia for prisoners convicted in Superior Court. Finding that 23 D.C. Code § 110(g) does not divest jurisdiction and that appellant has exhausted his remedies, we reverse the judgment of dismissal by the district court and remand for consideration on the merits.

Appellant was convicted in April, 1971 of grand larceny and larceny from the Government and sentenced to concurrent prison terms of twenty-two to ninety-six months and twenty months to five years respectively. His conviction was affirmed by the District of Columbia Court of Appeals. Pressley v. United States, No. 6063 (D.C.Ct.App., decided May 22, 1972).

On June 5, 1972, appellant, *pro se*, filed a motion for a new trial, claiming *inter alia*, ineffective assistance of counsel; the motion was denied without a hearing, and Pressley appealed. Counsel was appointed, and after full briefing and argument, the District of Columbia Court of Appeals again affirmed. Pressley v. United States, No. 6631 (D.C.Ct.App., decided March 2, 1973).

In July, 1972, during the pendency of his second appeal, Pressley filed another *pro se* motion to compel production of the grand jury voting record in his case. The trial judge dismissed the motion for want

of jurisdiction. Again after full briefing and argument by appointed counsel, the District of Columbia Court of Appeals affirmed, not on the jurisdictional ground, but on the merits. Pressley v. United States, No. 6803 (D.C.Ct.App., decided July 6, 1973).

On May 23, 1973, appellant filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the District of Columbia, alleging that his custody violated his constitutional rights to due process and effective assistance of counsel. On July 18, 1973, the district court dismissed the petition, stating that "this Court does not have jurisdiction over this matter, by virtue of 23 D.C.Code § 110 (g)." Pressley v. Swain, Habeas Corpus No. 30-73 (D.D.C., filed July 18, 1973).

Pressley appealed to this court, which on October 30, 1974, *sua sponte* remanded the record to the district court for clarification of its order. Specifically, we instructed that

> [t]he District Court should indicate whether, in ruling that he was without jurisdiction to entertain the petition for a writ of habeas corpus under 23 D.C.Code § 110(g), he considered the applicant as one who had exhausted his remedies in the local court system, or whether he ruled only that he was without jurisdiction because the applicant had not first sought a writ of habeas corpus in Superior Court as required by 16 D.C.Code § 1901(c) and 23 D.C.Code § 110 (a).

Pressley v. Swain, No. 73-1973 (D.C.Cir., Oct. 30, 1974).

On remand, the district court "respectfully advise[d] that on the papers then before it, it appeared that appellant had not adequately exhausted his remedies in the local court system. The Court made no determination as to the constitutionality of 23 D.C. Code § 110." Pressley v. Swain, Habeas Corpus No. 30-73 (D.D.C., Nov. 12, 1974). The court continued that "[i]t was not apparent that the suppression issue had ever been analyzed and there were aspects of the adequacy of counsel not passed upon at the local level. . . . The Court did not feel the question of the ultimate effect of 23 D.C.Code § 110 upon the viability of a further writ of habeas corpus in the District Court was ripe for decision in this case." *Id.*

Appellant now contends that the district court has jurisdiction to entertain petitions for habeas corpus, even after passage of section 110(g), and that he has exhausted his local remedies, having litigated every aspect of his claim in the local courts. The Government contests the district court's jurisdiction, but concedes that Pressley has exhausted his local remedies:

> regardless of whether appellant has actually exhausted his local remedies by an application to the Superior Court under 23 D.C.Code § 110, under the special circumstances of this case—where it is clear that the local court system has had a full opportunity to resolve the issues raised in appellant's petition—appellant should not be forced to relitigate his claim in the local court system before filing a petition in the District Court.

Response to Appellant's Supplemental Memorandum Directed to the Issue of Exhaustion of Local Remedies at 7 (footnotes omitted). We agree with appellant both as to jurisdiction and exhaustion.

[1-3] Today in Palmore v. Superior Court, *supra*, we held that section 110(g) does not affect the jurisdiction of the district court under 28 U.S.C. §§ 2241 *et seq.* and operates only as an exhaustion of remedies provision. We therefore must determine whether Pressley meets the requirements of section 2241. Since Pressley has been placed on parole through April, 1979, Gov't. Br. at 3 n.2, he is in custody within the meaning of section 2241. *See* Jones v. Cunningham, 371 U.S. 236, 239-44, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963). Appellant alleges that he is in custody in violation of his fifth amendment right to due process and his sixth amendment right to effective assistance of counsel; that suffices as a claim of "custody in violation of the Constitution." Thus, if the exhaustion requirement is met, Pressley has fulfilled all the conditions to maintaining his petition.

[4] Appellant argues that the district court erred in concluding that he failed to exhaust his remedies in the local court system. We agree. Pressley's two *pro se* collateral attack motions, which he styled "Motion for a New Trial," were, as such, clearly untimely under Super.Ct.R.Crim.P. 33. The Government, in opposing the motion on the merits, argued that compliance with rule 33 was jurisdictional, but then stated:

should this Court decide to review appellant's argument on the merits (*i.e., by treating his motion for new trial as a motion to vacate sentence under 23 D.C.Code § 110 (Supp.V, 1972);* cf. 28 U.S.C. § 2255), we submit that it is utterly meritless.

Supplemental Memorandum Directed to the Issue of Exhaustion of Local Remedies at 8 n.25 (emphasis added). *See also id.* (Gov't. in last local appeal "characterized the motion on appeal as a motion to vacate sentence under 23 D.C.Code § 110 (Supp. V, 1972)").

"[A]djudication upon the underlying merits of claims is not hampered by reliance upon the titles petitioners put upon their documents." Andrews v. United States, 373 U.S. 334, 338, 83 S.Ct. 1236, 1239, 10 L.Ed.2d 383 (1963); *See* Hill v. United States, 368 U.S. 424, 430, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962). This rule applies with special force to *pro se* motions. We therefore agree with appellant that "[b]y any reasonable analysis, [his] 'Motion for a New Trial' was in fact a collateral attack under 23 D.C.Code § 110." Supplemental Memorandum, *supra*, at 16 n.32. Both motions were considered on their merits by the District of Columbia Court of Appeals. Despite its silence on the issue in its opinions, we think it fair to say that the District of Columbia Court of Appeals treated the motions in that manner. Hence, it is plain that Pressley has exhausted his local remedies by first pursuing his claim through a motion under section 110.

Under any circumstance, no matter how the motions were styled, the local courts fully considered the constitutional claims on the merits. Thus, the local courts "had a full opportunity to determine the federal constitutional issues before resort was made to a federal forum, and the policies served by the exhaustion requirement would not be furthered by requiring submission of the claims to the [local] courts." Francisco v. Gathright, 419 U.S. 59, 63, 95 S.Ct. 257, 42 L.Ed.2d 226 (1974) (citations and footnotes omitted).

We hold that the district court erred in dismissing the petition on exhaustion grounds and reverse and remand for consideration on the merits.

So ordered.

ROBB, Circuit Judge (dissenting):

For the reasons stated in my dissent in Palmore v. Superior Court, —— U.S.App.D.C. ——, 515 F.2d 1294, I dissent.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

No. 73-1975

Habeas Corpus 30-73

JASPER C. PRESSLEY, APPELLANT

v.

C. L. SWAIN

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, Circuit Judges, sitting *en banc*

JUDGMENT

This cause came on to be heard by the Court sitting *en banc* and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by the Court *en banc* that the judgment of the District Court appealed from in this cause is hereby reversed and this case is hereby remanded to the District Court, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Date: July 9, 1975

Opinion for the Court filed by Circuit Judge Tamm.

Dissenting opinion filed by Circuit Judge Robb.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 30-73

JASPER C. PRESSLEY, PETITIONER

v.

C. L. SWAIN, RESPONDENT

ORDER

This matter having come before the Court on July 16, 1973 on a petition for a writ of habeas corpus, the rule to show cause having been issued; whereupon, the Court having considered the petition, the answer and supplemental answer thereto, the reply of petitioner and the answer to reply of petitioner and argument of counsel adduced in open court, it is by the Court this 19th day of July, 1973,

ORDERED that the rule to show cause be discharged and the petition dismissed as this Court does not have jurisdiction over this matter, by virtue of 23 D.C. Code § 110(g).

/s/ Gerhard A. Gesell
Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 30-73

JASPER C. PRESSLEY, PETITIONER

v.

C. L. SWAIN, RESPONDENT

MEMORANDUM

In response to the *sua sponte* Per Curiam Order of the United States Court of Appeals for the District of Columbia Circuit directing this Court to clarify its Order of dismissal for lack of jurisdiction, this Court respectfully advises that on the papers then before it, it appeared that appellant had not adequately exhausted his remedies in the local court system. The Court made no determination as to the constitutionality of 23 D.C. Code § 110. This issue was not directly raised.

It is apparent from the long history of Federal Court habeas corpus involving collateral attack on local judgments that this United States District Court will be well advised to refuse to accept jurisdiction without a clear demonstration that petitioner has exhausted all appropriate remedies at the local level. Where the local court action in the District of Columbia leaves in doubt whether constitutional issues have or have not been explicitly resolved by

the highest court, the remedy of habeas corpus in such cases should first be thoroughly pursued locally in the interests of clarity. If this procedure is followed, the highest local court can rule precisely, noting the underlying papers on which it relies. If habeas then subsequently lies to the District Court, the application can be efficiently processed. It will defeat the administration of justice in the District of Columbia to place upon the United States District Court a broad jurisdiction, in effect, to rummage through local court papers searching definite indication that an issue has or has not been specifically considered and resolved. The District Court should not drift into a situation where, in effect, it appears to act as a super-appellate reviewing court wherever constitutional issues are presented in local criminal trials. The fact that the local court is an Article I court in a special relationship to the United States District Court emphasizes the wisdom of confining constitutional issues to that court whenever possible so that the "humiliation of review" and the other matters of efficiency covered by Mr. Justice Powell in his concurring opinion in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250, 264 (1973), can be avoided. Insistence on procedural precision will do much to accomplish this result.

It was with these general considerations in mind that the Court acted as it did in the instant case. It was not apparent that the suppression issue had ever been analyzed and there were aspects of the adequacy of counsel not passed upon at the local

level. The writ should have been initially filed in the local courts. The Court did not feel the question of the ultimate effect of 23 D.C. Code § 110 upon the viability of a further writ of habeas corpus in the District Court was ripe for decision in this case.

/s/ Gerhard A. Gesell
United States District Judge

November 12, 1974.

Serve:

Mark W. Foster, Esquire
Public Defender Service
601 Indiana Avenue, N.W.
Washington, D.C. 20004
Counsel for Petitioner

Albert H. Turkus, Esquire
Assistant United States Attorney
Washington, D.C.
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Robert M. Weinberg, Esquire
Bredhoff, Cushman, Gottesman & Cohen
1000 Connecticut Avenue, N.W.
Washington, D.C.

APPENDIX H

1. *Constitutional Provisions*

Article I, Section 8 of the Constitution provides in pertinent part:

> The Congress shall have Power * * *
>
> * * * * *
>
> [cl. 9] To constitute Tribunals inferior to the supreme Court;
>
> * * * * *
>
> [cl. 17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *.

Article I, Section 9, cl. 2 provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Article III, Section 1 of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which not be diminished during their Continuance in Office.

Article III, Section 2 of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. *United States Code Provisions*

28 U.S.C. 2241 provides in pertinent part:

> § 2241. Power to grant writ.
>
> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. 2243 provides in pertinent part:

§ 2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

* * * * *

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

* * * * *

28 U.S.C. 2254 provides in pertinent part:

§ 2254. State custody; remedies in State courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by any application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determina-

tion of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

* * * * *

28 U.S.C. 2255 provides:

§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause

notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

3. *District of Columbia Code Provision*

23 D.C. Code 110 provides:

(a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

(b) A motion for such relief may be made at any time.

(c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that (1) the judgment was rendered without jurisdiction, (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, (3) there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner, resentence him, grant a new trial, or correct the sentence, as may appear appropriate.

(d) A court may entertain and determine the motion without requiring the production of the prisoner at the hearing.

(e) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

(f) An appeal may be taken to the District of Columbia Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

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Supreme Court, U. S.
FILED
MAY 10 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-811

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL.,
Petitioners

—*v.*—

ROOSEVELT F. PALMORE

C. L. SWAIN, SUPERINTENDENT, LORTON REFORMATORY,
Petitioner

—*v.*—

JASPER C. PRESSLEY

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRITS OF CERTIORARI FILED DECEMBER 5, 1975
CERTIORARI GRANTED FEBRUARY 23, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-811

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL.,
Petitioners

—*v.*—

ROOSEVELT F. PALMORE

C. L. SWAIN, SUPERINTENDENT, LORTON REFORMATORY,
Petitioner

—*v.*—

JASPER C. PRESSLEY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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I. *Superior Court of the District of Columbia, et al.* v. *Palmore*

RELEVANT DOCKET ENTRIES

Date	Entries	Judge
May 15, 1973	Application for Writ of Habeas Corpus; P & A's; Appendix	
	• • • •	
May 16, 1973	Order directing respondent to show cause on or before the 10th day after service	Judge McGuire
May 16, 1973	Rule to show cause & copies issued; ser: 5/18/ on #2 & #3 #1 5-25-73	
	• • • •	
June 4, 1973	Return and answer of respondents to show cause; memorandum of Law; c/m 6-4-73; Exh. Appearance Harold H. Titus, Jr. and Craig M. Bradley, U.S. Attorney's Office.	
June 7, 1973	Order setting hearing on Rule to Show Cause for June 18, 1973 at 9:30	Judge Sirica
	• • • •	
June 8, 1973	Order granting petitioner's motion to continue bail pending appeal.	Judge Sirica
June 15, 1973	Reply Memorandum by petitioner p/s 6/15/73.	
June 21, 1973	Supplemental Memorandum of petitioner; p/s 6/21/73.	
Jul. 13, 1973	Further Supplemental Memorandum of Petitioner; Exhibit; p/s 7/13/73.	
Jul. 16, 1973	Appearance of Thomas G. Krattenmaker entered as co-Counsel for petitioner.	
Jul. 15, 1974	ORDER discharging rule to show cause and dismissing petition (signed 7/10/74)	Judge Waddy

Date	Entries	Judge
Jul. 17, 1974	NOTICE of appeal by petitioner from order of July 15, 1974. Copy to U.S. Att.	Judge Waddy
	* * * *	
July 31, 1975	Certified copy of judgment USCA reversing and remanding cause to U.S. District Court. Opinion attached.	
Aug. 1, 1975	Transmittal sheet U.S.C.A. returning original record to U.S.D.C.	
Aug. 8, 1975	Report and recommendation of Mag. Margolis.	
	* * * *	
Sept. 3, 1975	AMENDED Jurisdictional Allegations by applicant; attachment; c/s 9-3-75.	
	* * * *	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 31-73

[Filed May 15, 1973, James F. Davey, Clerk]

ROOSEVELT F. PALMORE,
1880 South Addison Road,
District Heights, Maryland, APPLICANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA,
Fifth and E Streets, N.W.,
Washington, D.C.,

THE ATTORNEY GENERAL OF THE UNITED STATES,
United States Department of Justice,
Washington, D.C.,

and

DIRECTOR, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
614 H Street, N.W.,
Washington, D.C., RESPONDENTS

APPLICATION FOR WRIT OF HABEAS CORPUS

Roosevelt F. Palmore respectfully applies for the issuance of a writ of habeas corpus and in support thereof alleges and represents as follows:

1. Applicant is a citizen of the United States and is now in custody under the authority of the United States of America, and for an act done or omitted pursuant to an Act of Congress, and in violation of the Constitution of the United States.

2. Applicant is presently in the custody of the Superior Court of the District of Columbia and the judges and officers thereof. As more fully alleged herein, applicant will shortly be in the custody of either the Attorney General of the United States and his subordinates, or the Director of the District of Columbia Department of Corrections and his subordinates, or both.

3. This Court has jurisdiction to entertain this application and issue the writ of habeas corpus as prayed herein pursuant to 28 U.S.C. §§ 2241 *et seq.* Jurisdiction is also invoked under and by virtue of Article I, § 9, cl. 2 and Article III of the Constitution of the United States and 28 U.S.C. § 1651.

4. On April 27, 1971, the Superior Court of the District of Columbia entered a judgment convicting applicant of the crime of carrying a dangerous weapon in violation of D.C. Code § 22-3204, and sentencing him to imprisonment for not less than two years, nor more than six years. Execution of the sentence was suspended, except for six months, and applicant was placed on probation for six years. The aforesaid judgment does not state the name or title of the person having custody of applicant.

5. Applicant commenced service of the aforesaid sentence on April 27, 1971, and was incarcerated in the custody of either the Attorney General of the United States, or the Director of the District of Columbia Department of Corrections, or both, for a period of thirty seven days when, by further order, the Superior Court of the District of Columbia admitted applicant to bail pending appeal. At the time this application is filed, applicant is in custody pursuant to the order of the Superior Court admitting him to bail pending appeal.

6. On April 28, 1972, the District of Columbia Court of Appeals entered a judgment affirming applicant's conviction, but thereafter that court stayed transmittal of its mandate pending review by the Supreme Court of the United States.

7. On April 24, 1973, the Supreme Court of the United States granted, in part, applicant's petition for a writ of certiorari and affirmed the judgment of the District of Columbia Court of Appeals. The Supreme Court denied applicant's petition for writ of certiorari with respect to the constitutional claim raised by this application.

8. The sole evidence against applicant was obtained by police officers in violation of applicant's right to be

free from unreasonable searches and seizures under the Fourth Amendment to the Constitution of the United States in that:

(a) while applicant was violating no law, police officers, acting without probable cause to believe that an offense had been, was being, or was about to be, committed and also acting without a suspicion having an articulate basis in fact to warrant the intrusion, selected applicant for a "spot check," forced his automobile to the side of the road, and detained applicant pending completion of the "spot check";

(b) among other things, the purpose of the "spot check" was to investigate suspicious persons and to complete investigative forms prepared by a division of the Metropolitan Police Department and to see if applicant had committed a crime;

(c) during the aforesaid "spot check", but well after the point in time when the police officers had forced applicant to the side of the road and detained him, a gun was seized by the officers from applicant's automobile;

(d) the gun which the officers seized as aforesaid was admitted into evidence at applicant's trial before the Superior Court of the District of Columbia over applicant's Fourth Amendment objection.

9. The Superior Court of the District of Columbia and the District of Columbia Court of Appeals have each denied applicant relief from the violation of applicant's right to be free from unreasonable seizures and searches in accordance with the Fourth Amendment to the Constitution.

10. No judge or court of the United States has determined the legality of applicant's detention on the grounds set forth herein, either on prior application for writ of habeas corpus or otherwise.

11. Applicant is now in custody and restrained of his liberty by virtue of the order of the Superior Court of the District of Columbia admitting him to bail pending appeal. On information and belief, the mandate of the Supreme Court of the United States will issue on

or about May 19, 1973, and the mandate of the District of Columbia Court of Appeals will issue on or about May 21, 1973. Thereafter, and on or about May 22, 1973, applicant will be returned to the custody of the Attorney General of the United States or the Director of the District of Columbia Department of Corrections, or both, pursuant to the judgment of conviction entered by the Superior Court of the District of Columbia.

12. Both the aforesaid order of the Superior Court of the District of Columbia admitting applicant to bail pending appeal and the judgment of conviction of that court are in violation of the Fourth Amendment to the Constitution of the United States.

WHEREFORE, this application should be granted and a writ of habeas corpus should issue.

/s/ Frank F. Flegal
FRANK F. FLEGAL
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(624-8208)

Attorney for Applicant

May 15, 1973

VERIFICATION

DISTRICT OF COLUMBIA: ss.

ROOSEVELT F. PALMORE, being duly sworn, deposes and says that he has read the foregoing application for a writ of habeas corpus and that the factual statements, allegations and representations set forth therein are true and complete.

/s/ Roosevelt F. Palmore
ROOSEVELT F. PALMORE

Subscribed and sworn to before me this 15th day of May, 1973.

/s/ Anna M. Snow
Notary Public

Comm. Exp. 5/14/77

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 31-73

[Filed May 15, 1973, James F. Davey, Clerk]

ROOSEVELT F. PALMORE, APPLICANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, *et al.*, RESPONDENTS

APPLICANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR A WRIT OF HABEAS CORPUS

Preliminary Statement

Applicant seeks issuance of a writ of habeas corpus on the ground that the order and judgment of conviction which constitute the basis for the restraint of applicant's liberty are in violation of the Fourth Amendment to the Constitution. Two issues are presented for the Court's determination. First, the threshhold question of jurisdiction to entertain this application. Second, assuming jurisdiction, the merits of applicant's Fourth Amendment claim. We address these issues *seriatim* after first setting forth the pertinent facts.[1]

The Facts

Resolution of the jurisdictional issues does not require a detailed statement of the facts. Thus, for the Court's convenience, we first set forth a summary of the

[1] As an appendix to this memorandum, applicant has annexed a copy of the printed record filed with the Supreme Court of the United States. This record was designated and filed pursuant to agreement between applicant's counsel and the Solicitor General of the United States in accordance with the Rules of the Supreme Court and contains all portions of the local court record pertinent to the issues raised here.

pertinent developments in the case sufficient to permit full consideration of the question of jurisdiction. Thereafter, as necessary for disposition of applicant's Fourth Amendment claim, we detail the pertinent facts reflected in the local court record.

A. *Summary of the Case.* On February 23, 1971, a grand jury returned an indictment in the Superior Court of the District of Columbia charging applicant with carrying a dangerous weapon, a gun, in violation of D.C. Code § 22-3204. Prior to trial, applicant moved the Superior Court to dismiss the indictment contending that only a court ordained and established in accordance with Article III of the Constitution had jurisdiction to hear and determine the charge against him (R.[2] 4). Applicant also moved for an order suppressing as evidence a gun, and all testimony pertaining thereto, on the ground that his Fourth Amendment right to be free from unreasonable searches and seizures had been violated by police officers in obtaining that gun (R. 5). The Superior Court denied both motions (R. 8-11, 42-43), found applicant guilty of the charge set forth in the indictment (R. 47), and thereafter imposed sentence and entered its judgment of conviction (R. 50).

Applicant perfected an appeal to the District of Columbia Court of Appeals. On April 28, 1972, that court affirmed the judgment of the Superior Court, expressly passing on both of the constitutional issues which applicant had raised in the trial court. *Palmore* v. *United States*, 290 A.2d 573 (D.C. App. 1972) (R. 52-68).

Applicant sought review in the Supreme Court of the United States invoking alternatively that Court's appellate jurisdiction pursuant to 28 U.S.C. § 1257(2) and its certiorari jurisdiction pursuant to 28 U.S.C. § 1257(3). On April 24, 1973, the Supreme Court held that it lacked appellate jurisdiction but granted a writ of certiorari limited to applicant's claim under Article III of the Constitution. *Palmore* v. *United States*, —— U.S. ——, 41 L.W. 4528, 4529-4530. That contention

[2] The abbreviation "R." refers to the record annexed to this memorandum as an appendix. See *supra*, p. 1 n.1.

is, of course, foreclosed and is not pressed here. The Supreme Court, however, expressly declined to pass on applicant's claim under the Fourth Amendment to the Constitution, denying the petition for writ of certiorari on that issue. *Palmore* v. *United States, supra,* 41 L.W. at 4530 n.6. That is the sole issue raised in this application for writ of habeas corpus and the threshhold issue thus turns on this Court's jurisdiction to entertain this application under these circumstances.

B. *The Facts.*[3] On January 16, 1971, Officers Busker and Morrissette were assigned to the Special Operations Division ("S.O.D.") of the Metropolitan Police Department, working in casual clothes in an unmarked police vehicle (R. 12). About 8:00 p.m. that evening, these officers were parked at the curb near Vermont and Florida Avenues, N.W., when they observed applicant drive by in an automobile (R. 19-20). Applicant had violated no law or traffic regulation, there was no apparent equipment defect on his automobile, the officers had received no word that this vehicle was reported stolen, and the officers had no other factual basis to believe that applicant was engaged in criminal activity (R. 61-62, 35).[4]

Noting that the automobile had Virginia rental "tags" (R. 12), the officers decided to stop applicant for a "spot check" (R. 18, 35)[5] pursuant to instructions given

[3] The facts set forth herein are taken solely from the local court record. Although applicant and his witness gave a different version of the events than did the police officers, the trial court believed the officers (R. 43). We do not ask this court to pass upon credibility in this habeas corpus proceeding. Rather, we have confined our statement of the facts to the testimony of the police officers, *i.e.*, the Government's version of the facts.

[4] Both the District of Columbia Court of Appeals (290 A.2d at 581; R. 61-62) and the Supreme Court of the United States (41 L.W. at 4528) made findings on this point. The Government has never contended otherwise.

[5] A "spot check," also referred to interchangeably as a "traffic check" (R. 25), consists of stopping a vehicle and demanding that the operator produce for inspection his driver's license and registration certificate (R. 18, 38). During a "spot check," special forms are completed and returned to the S.O.D. for departmental use (R. 35-36).

them by their superiors (R. 19, 35). Officer Busker, the senior officer (R. 39) who decided to make the "spot check" (R. 14, 20), had never received instructions as to the basis by which he was to select a particular vehicle for a "spot check," and he believed that "this is left up to each individual officer" (R. 19). While his reason for stopping a particular automobile varies at "a given time" (R. 19), Officer Busker frequently stops rented automobiles and had been doing so for "over a year" when this case was tried in the Superior Court (R. 22). Officer Busker stops rented automobiles because:

> ". . . a lot of these care are rented, and are not taken back on time, and on other occasions I have personally known where an officer stopped a rental car and got about $6,000 worth of dope out of the car" (R. 21).

Officer Busker is concerned about overdue rental cars because, in his view, "it's a criminal charge" to operate a rental car with an overdue agreement (R. 26), and he thus conducts "spot checks" so that "the man driving can prove that it's his car" (R. 25).

A special form had been prepared by S.O.D. for its officers to complete when "spot checks" are made (R. 35). This form, which is not a numbered police department form (R. 36), is handed in at the conclusion of an officer's duty and lists "the information that the department would like" including "the name, the address of the person driving, the color of the vehicle, the tag number, the driver's permit number, and the color, the number of occupants in it" (R. 35-36).

Pursuant to this "spot check" policy, the officers forced applicant to the side of the road (R. 20, 22, 29, 30) after advising a second unmarked police car manned by two other plainclothes officers of their intentions (R. 29, 38-39). Applicant stopped his car, got out of the vehicle, and walked toward Officer Busker (R. 14), who asked applicant to produce his driver's license and rental agreement form (R. 15). Applicant immediately produced a valid driver's license (R. 15) and returned

to the automobile to obtain the rental form which was in the glove compartment (R. 15). During this time, applicant was not free to refuse the officers' request and drive away (R. 28).

Applicant's rental form bore an expiration date several days earlier, and the officer engaged applicant in a conversation lasting a minute or two "about the rental agreement" (R. 18, 23). While Officer Busker and applicant were engaged in this conversation, Officer Morrissette stationed himself on the passenger side of the automobile in order to "protect" his partner (R. 38). He was "observing everything that might be inside the car" (R. 37) because there might be "numerous things in the glove compartment that [applicant] could be charged with" (R. 40). By shining his flashlight beam into the car (R. 32) and by bending [his] torso (R. 37), Officer Morrissette observed "the hammer mechanism" of a gun under the lowered armrest (R. 32). He notified Officer Busker of his discovery, and applicant was placed under arrest (R. 18, 32-33).

The Superior Court denied applicant's motion to suppress as evidence the gun, and testimony relating thereto, holding that the "spot check" procedure revealed by this record was not "unreasonable even under the Fourth Amendment to the Constitution" (R. 42). The District of Columbia Court of Appeals agreed (R. 61-66).

ARGUMENT

I

THIS COURT HAS JURISDICTION TO ISSUE THE WRIT

The jurisdictional inquiry involves two separate considerations. First, is the applicant in "custody" within the meaning of 28 U.S.C. § 2241?[6] Second, is this Court

[6] Since the District of Columbia is not a "state" absent a clear Congressional intention to treat it as such in a particular circumstance, *Palmore* v. *United States*, —— U.S. ——, 41 L.W. 4528, 4529-4530 (1973); *District of Columbia* v. *Carter*, —— U.S. ——,

possessed of jurisdiction to issue a writ of habeas corpus on application of one convicted by the local District of Columbia courts after the applicant has unsuccessfully sought vindication of a constitutional[7] claim in the local courts? For reasons which follow, we submit that both questions must be answered affirmatively.

It is, of course, fundamental that the writ will issue only on the application of one in "custody." At the time this application was filed, applicant was enlarged on bail pending appeal from the judgment of conviction entered by the Superior Court. That status constitutes "custody" within the meaning of habeas corpus statutes. Hensley v. Municipal Court, —— U.S. ——, 41 L.W. 4513 (1973). Absent intervention by this Court,[8] applicant will shortly be subject to either actual incarceration or an extended period of probation. That status, like applicant's present status, also constitutes "custody" for purposes of the habeas corpus statutes. *Jones* v. *Cunningham*, 371 U.S. 236 (1963); *Stolte* v. *Laird*, 353 F. Supp. 1392, 1395 (D.D.C. 1972) (Robinson, J.). It is thus clear that applicant meets the "custody" requirement for habeas corpus relief.

Putting to one side for a moment any *sui generis* problems which may have been created by the reorganization of the courts in the District of Columbia, it is also clear that applicant has satisfied the standard exhaustion requirement which is a precondition to an applica-

93 S. Ct. 602, 604 (1973), we contend that the appropriate jurisdictional statute is 28 U.S.C. § 2241, not 28 U.S.C. § 2254 which pertains to state "custody." In any event, the "custody" test is the same under either statute. Cf. *Heflin* v. *United States*, 358 U.S. 415 (1959).

[7] This application tenders for decision only a Fourth Amendment claim which is clearly cognizable on application for habeas corpus by one held in either state or federal custody. *Kaufman* v. *United States*, 394 U.S. 217 (1969). There is thus no occasion to decide the availability of the writ when sought on a purely "local" issue.

[8] Applicant's present status pursuant to the bail order of the Superior Court will continue pending disposition of this application unless otherwise ordered by the Court. Rule 23(a), F.R.A.P. Thereafter, applicant's custody will turn on the disposition of this application in accordance with Rule 23(b), (c), F.R.A.P.

tion for habeas corpus. *Roberts* v. *LaVallee*, 389 U.S. 40 (1967); *Brown* v. *Allen*, 344 U.S. 443 (1953). As *Roberts* and *Brown* made clear, it is not necessary that an applicant for federal habeas corpus make a post-conviction application in the state courts if the applicant has already unsuccessfully urged the very point on a direct appeal in the state courts. The same principle is applied in federal custody cases. Cf. *Noyd* v. *Bond*, 395 U.S. 683 (1969); *Gusik* v. *Schilder*, 340 U.S. 128 (1950); *Parisi* v. *Davidson*, 405 U.S. 34 (1972).[9] Thus, unless the dual court system in the District of Columbia calls for a different jurisdictional rule, it is plain that the applicant satisfies all the jurisdictional and comity requirements of 28 U.S.C. § 2241.[10] We accordingly turn to an analysis of the District of Columbia statutes and considerations and demonstrate that these matters do not call for a different conclusion.

There are three separate statutory provisions of relevance to the jurisdictional inquiry. First, the general federal habeas corpus statute, 28 U.S.C. §§ 2241 *et seq.*, upon which we rely. Second, the local habeas corpus statute, D.C. Code § 16-1901. Finally, the local post-conviction relief statute, D.C. Code § 23-110. As we proceed to demonstrate, these statutes are not in conflict and support this Court's jurisdiction in the circumstances of this case.

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[9] The cited federal custody cases illustrate the exhaustion principle as applied to military prisoners seeking habeas corpus in the federal civilian courts. See generally, Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 Va.L.Rev. 483 (1969). The same principles are applied when territorial prisoners seek federal habeas corpus. *E.g.*, *Maldonado* v. *Delgado*, 345 F. Supp. 993 (D.P.R. 1972).

[10] Applicant satisfies three separate jurisdictional requirements of an application for habeas corpus pursuant to 28 U.S.C. § 2241. First, applicant is "in custody under or by color of the authority of the United States" within the meaning of 28 U.S.C. § 2241(c)(1). *Benson* v. *Henkel*, 198 U.S. 1 (1905). Second, applicant is in custody "for an act done or omitted in pursuance of an Act of Congress" within the meaning of 28 U.S.C. § 2241(c)(2). *Palmore* v. *United States*, —— U.S. ——, 41 L.W. 4528, 4531, 4533, 4534 (1973). Finally, applicant "is in custody in violation of the Constitution * * * of the United States" within the meaning of 28 U.S.C. § 2241(c)(3). *Kaufman* v. *United States*, 394 U.S. 217 (1969).

First, it is obvious that this Court is a "district court" within the meaning of 28 U.S.C. § 2241. Congress has expressly defined the term "district court" to mean "the courts constituted by chapter 5 of [title 28, United States Code]." 28 U.S.C. § 451. This Court is a court constituted by chapter 5. 28 U.S.C. § 88. See *O'Donoghue* v. *United States*, 289 U.S. 516 (1933); *Palmore* v. *United States*, —— U.S. ——, 41 L.W. 4528, 4533 (1973). No provision of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 *et seq.*, purports to provide otherwise, or to amend the federal habeas corpus act so as to exclude this Court from the "district court[s]" vested with federal habeas corpus jurisdiction. It is therefore not necessary to grapple with the serious constitutional problems which would arise had Congress done so. See *infra*, pp. 12-13.

Second, D.C. Code § 16-1091, as amended by the Court Reorganization Act, § 145(h), 84 Stat. 560, vests this Court with jurisdiction to issue writs of habeas corpus "to Federal officers and employees" while conferring similar jurisdiction on the Superior Court with respect to writs "directed to any other person." This, we submit, is merely an illustration of the frequent situation where this Court has jurisdiction pursuant to two different statutes. Cf. *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949). A writ of habeas corpus may issue on grounds other than those specified in the general habeas corpus statutes, and in such a situation, the applicant must direct his application to the appropriate District of Columbia Court in accordance with D.C. Code § 16-1901. The fact that additional habeas corpus jurisdiction is vested by that statute does not preclude the exercise of general habeas corpus jurisdiction under 28 U.S.C. §§ 2241 *et seq.* See, *e.g.*, *Stewart* v. *Overholser*, 87 U.S.App.D.C. 402, 186 F.2d 339 (1951) (*en banc*); *Bland* v. *Rodgers*, 332 F. Supp. 989, 992 (D.D.C. 1971).

Finally, the local post-conviction statute, D.C. Code § 23-110, must be considered. That statute provides:

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for

> relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." D.C. Code § 23-110(g).

There are two ways to read this confusing provision of law. First, the section may be read to mean that no federal court shall entertain an application for writ of habeas corpus involving a federal constitutional issue unless either (1) the applicant has exhausted his local post-conviction remedies or (2) the local courts have passed upon the constitutional claim and denied relief. This reading, the one for which we contend, presents no constitutional difficulties and comports with the general principles of exhaustion set forth in cases such as *Wilwording* v. *Swenson*, 404 U.S. 249 (1971); *Roberts* v. *LaVallee*, 389 U.S. 40 (1967); and *Brown* v. *Allen*, 344 U.S. 443 (1953). This reading comports with the sprace legislative history,[11] maintains a local-federal balance between the courts in the District of Columbia, extends full comity to the local courts, and preserves to the constitutional courts in the District of Columbia the "last say" on federal constitutional matters. *Palmore* v. *United States*, —— U.S. ——, 41 L.W. 4528, 4533 (1973); *Fay* v. *Noia*, 372 U.S. 391 (1963); *Kaufman* v. *United States*, 394 U.S. 217 (1969); *Brown* v. *Allen*, 344 U.S. 443, 508 (1953) (separate opinion of Frankfurter, J.); Bator and

[11] This section commanded only passing reference in the legislative reports. The Senate Report merely states: "Rather than relying on the inherent power of the superior court to review judgments of conviction, the new section provides statutory procedures for postconviction challenges. Section 23-110 is modeled upon 28 U.S.C. section 2255 with only the necessary technical changes." S. Rep.No. 91-405, 91st Cong., 1st Sess. at 38 (1969). The House Report is even more terse. H.R.Rep.No. 91-907, 91st Cong., 2d Sess. at 171 (1970). Neither in the legislative reports nor in the reported hearings and debates is there any suggestion that Congress intended to suspend the availability of the writ of habeas corpus from the federal constitutional courts.

Hart, *The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 106-107 (1959).

The other reading of this section would always preclude a federal constitutional court from considering an application for writ of habeas corpus claiming denial of a federal constitutional right since it will always be the case that either (1) the applicant has remaining a post-conviction remedy in the local courts or (2) the local courts have rejected his constitutional claim and denied relief.[12] There are two reasons why, we submit, the Court should decline to adopt this reading of the statute.

First, this reading would make the District of Columbia the only place in the nation where a criminal defendant can never obtain a ruling on a federal constitutional issue from a federal constitutional court. The Supreme Court's recent opinion sharply points out the contrast between the non-constitutional local courts and the constitutional status of this Court. *Palmore* v. *United States*, —— U.S. ——, 41 L.W. 4528 (1973). In holding that Congress need not provide a constitutional court to hear and determine criminal charges against persons accused of violating a local criminal statute, the Supreme Court relied on the non-availability of a constitutional court in state criminal trials, 41 L.W. at 4528, 4532, in criminal trials before federal military tribunals, 41 L.W. at 4532, and in criminal trials before federal territorial courts, 41 L.W. at 4532. Yet, in each of these situations, vindication of federal constitutional claims in the constitutional courts by writ of habeas corpus is available.[13] As

[12] In *Bland* v. *Rogers*, 332 F. Supp. 989 (D.D.C. 1971), Judge Walsh was confronted with a unique third possibility, for in that case the local judge had denied an application "without prejudice." In those circumstances, Judge Walsh found jurisdiction under 28 U.S.C. § 2241 although he indicated, in dictum, that there would have been no jurisdiction had the local judge denied the application "with prejudice." 332 F. Supp. at 992.

[13] *E.g.*, *Fay* v. *Noia*, 372 U.S. 391 (1963) (state court defendant); *Burns* v. *Wilson*, 346 U.S. 137 (1953) (military defendant); *Stolte* v. *Laird*, 353 F. Supp. 1352 (D.D.C. 1972) (military defendant); *Maldonado* v. *Delgado*, 345 F. Supp. 993 (D.P.R. 1972) (defendant

we read the Supreme Court's opinion, the same is true in the District of Columbia, for the Court pointed out that "the position of the District of Columbia defendant is similar to that of the citizen of any of the 50 States when charged with violation of a state criminal law . . . ." *Palmore* v. *United States*, *supra*, 41 L.W. at 4528.[14] Thus it was that the Supreme Court, pointing out the distinction between the local courts and the constitutional courts within the District of Columbia, noted:

> ". . . the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit are constitutional courts manned by Art. III judges to which the citizens of the District must or *may resort for consideration of those constitutional and statutory matters of general concern . . . .*" *Palmore* v. *United States*, *supra*, 41 L.W. at 4533 (emphasis added).

That is precisely what applicant has done, seeking to avail himself of the right to seek federal habeas corpus which would be available in any other part of the nation. It ought to take more than an awkwardly worded sentence with no evidence of legislative intent to deprive him of the very fundamental privilege of the writ of habeas corpus.

There is a further reason why § 23-110(g) should not be construed to preclude habeas corpus jurisdiction in the constitutional courts, for it is fundamental that statutes will be construed to avoid constitutional questions and serious constitutional issues would be presented if Congress ever atttempted to suspend the availability of the writ in the constitutional courts. As the Supreme Court

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convicted by local territorial court). In all three situations, of course, exhaustion of state, military or local court remedies is a precondition to federal habeas corpus.

[14] This was consistent with the Government's argument that "Congress merely sought to establish a local court system, comparable to those in the several states, for adjudication of all non-federal matters arising in the District of Columbia." Brief for the United States, *Palmore* v. *United States*, No. 72-11, Oct. T. 1972, at p. 48. Nothing, of course, could be more "federal" that an issue arising under the federal Constitution.

has made clear, one of the inherent attributes of constitutional courts is the power to issue writs of habeas corpus. *McNally* v. *Hill*, 293 U.S. 131, 135 (1934);[15] *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 295 (1904) (Brewer, J., concurring); *Rowe* v. *Peyton*, 383 F.2d 709, 715 (4th Cir. 1967), *aff'd.*, 391 U.S. 54 (1968). As Professor Freund has argued, "[H]aving established Federal courts Congress would be powerless to deny the privilege of the writ. Otherwise Article I, section 9 would be reduced to a dead letter." Brief for Respondent, *United States* v. *Hayman*, No. 23, Oct. T. 1951, at p. 29. The Supreme Court has quoted Professor Freund's brief on this very point with approval in *Fay* v. *Noia*, 372 U.S. 391, 406 n.15 (1963). Since the privilege of the writ can only be suspended in cases of "rebellion or invasion," Art. I, § 9, cl. 2, it is clear that any construction of the local post-conviction remedy statute which would bar resort to the federal constitutional courts for the adjudication of federal constitutional issues would raise substantial doubts as to the statute's validity under the Suspension Clause of the Constitution. Hornbook principles of statutory construction call for a reading that avoids constitutional doubts, and this is particularly true where the statute, as here, is far from clear on its face and comes before the Court unaccompanied by any legislative expression of an intent to suspend the writ. *Dorsey* v. *Gill*, 80 U.S.App.D.C. 9, 16, 148 F.2d 857, 864, *cert. denied*, 325 U.S. 890 (1945).[16]

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[15] *McNally* was overruled on its construction of "custody" within the meaning of the habeas corpus statutes in *Peyton* v. *Rowe*, 391 U.S. 54 (1968), but the Supreme Court said nothing do detract from the validity of the point for which we cite the case.

[16] Of course, protection against abuse of the writ does not constitute a suspension of the writ. But that protection is built into the federal statutes for 28 U.S.C. § 2244 provides that no federal court or judge need entertain an application for the writ that has once been denied by a "court of the United States or a justice of judge of the United States." This Court, a constitutional court, is a "court of the United States." *E.g.*, *Federal Trade Commission* v. *Klesner*, 274 U.S. 145, 154 (1926); *Embry* v. *Palmer*, 107 U.S. 3 (1882). See generally, *Palmore* v. *United States*, *supra*; *O'Donoghue* v. *United States*, 289 U.S. 516 (1933). The local courts, non-consti-

For these reasons, we submit that the federal habeas corpus statute, 28 U.S.C. §§ 2241 *et seq.*, confers upon this Court jurisdiction to entertain this application for a writ of habeas corpus presenting only a federal constitutional claim. And, applicant having exhausted his remedies before the local courts,[17] we turn to the merits.

II

APPLICANT IS CONFINED IN VIOLATION OF THE FOURTH AMENDMENT

In overruling applicant's claim that he was unreasonably seized by police officers in violation of the Fourth Amendment, the local courts held that a police officer need observe no violation of law nor articulate any reason before he forces a motorist to pull his automobile to the curb and produce for the officer's inspection a driver's permit and motor vehicle registration certificate. If, during the course of such a forcible selective stop, the officer observes evidence of a crime in "plain view," the local courts have held that he may seize that evidence and use it to obtain the motorist's conviction over timely Fourth Amendment objection. We contend that the selective, forcible stop shown on this record violated applicant's right to be free from unreasonable seizures because: (1) any seizure of an individual made without at least an articulable suspicion of criminal behavior is "unreasonable" under the Fourth Amendment; and (2) the seizure shown on this record cannot be sustained on "health and safety" grounds since (a) this was not a "health and safety" seizure at all and (b) even if it were, the Fourth Amendment requires that selective intrusions, even so-

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tutional courts, are not "courts of the United States" within the meaning of such statutes. *United States* v. *Mills*, 11 App. D.C. 500 (1897); cf. *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 16-18, 45 (1899).

[17] *E.g.*, *Wilwording* v. *Swenson*, 404 U.S. 249 (1971); *Roberts* v. *La Vallee*, 389 U.S. 40 (1967); *Brown* v. *Allen*, 344 U.S. 443 (1953).

called "health and safety" ones, be subject to minimum articulable suspicion standards.[18]

The Fourth Amendment provides protection not only against unreasonable searches but also unreasonable "seizures." *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Adams* v. *Williams*, 407 U.S. 143 (1972). A seizure is unreasonable under the Fourth Amendment unless, at a minimum, the police have "specific and articulable facts which, taken together with rational inferences from those facts, warrant that intrusion." *Terry* v. *Ohio*, *supra*, 392 U.S. at 21. It is conceded, and the local courts expressly found, that the police officers had no such articulable facts when they seized applicant. (R. at 62). On this record, the local courts could not have done otherwise, for it could not be seriously maintained that the activity in which applicant was engaged—lawfully operating a motor vehicle in accordance with all provisions of law on the public streets —constitutes an articulable basis of suspicion warranting police intrusion into the motorist's freedom. *Commonwealth* v. *Swanger*, —— Pa. ——, 300 A.2d 66 (1973).[19]

The local courts held that Fourth Amendment protections against unreasonable seizures do not apply to seizures arguably related to "health and safety." *Palmore* v. *United States*, 290 A.2d 573, 583 n.25 (1972), *cert. denied on this issue*, —— U.S. ——, 41 L.W. 4528, 4530 n.6 (1973). This conclusion is a question of law on a constitutional matter which must be determined by this Court. *Townsend* v. *Sain*, 372 U.S. 293, 318 (1963). As a matter of constitutional law, we submit that this seizure cannot be sustained on "health and safety" grounds.

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[18] Since no one can contend that police officers may stop traffic solely to get a "plain view" of "everything that might be inside the car" (R. 37), the local court properly held that the lawfulness of the seizure of the gun turns on the lawfulness of the seizure of applicant (R. 66). See *Harris* v. *United States*, 390 U.S. 234, 236 (1968).

[19] The Prothonotary of the Pennsylvania Supreme Court has advised us that the notation "rehearing denied" appearing at 300 A.2d 66 is in error, and that the Pennsylvania Supreme Court has granted an application for rehearing, heard additional argument, and now has the case under advisement.

First, we do not think there are any "health and safety" considerations involved in this case.[20] A careful reading of the local court's opinion makes it clear that that court thought the Fourth Amendment inapplicable when police officers stop automobiles "to investigate some criminal behavior []related to the possession of a valid license and valid registration." 290 A.2d at 283 n.24; R. 64 n.24. On the record, the local court could not have properly affirmed appellant's conviction unless it so held, for the police officer flatly testified that he stopped applicant's automobile to ascertain whether there were grounds for a "criminal charge" of operation of an overdue rental car (R. 26).

This case vividly illustrates the hazards of indiscriminate use of the "health and safety" label. Here, what is termed a "routine spot check" for "health and safety" purposes involved two unmarked cars and four plain clothes officers, one of whom immediately stationed himself on the passenger side of applicant's vehicle "for the protection of [his] partner" (R. 38) and remained in that position looking for "things in the glove compartment

[20] There is no "health" consideration involved in the possession of a driver's license and motor vehicle registration certificate, and there is no "safety" consideration involved with respect to registration certificates. The motor vehicle registration procedure in both the District of Columbia and Virginia is principally a revenue-raising measure (D.C. Code § 40-102; 40 Va. Code §§ 46.1-149, 167), and merely by observing the visible license plate, a policeman can readily ascertain whether the owner of the vehicle has complied with the registration requirements. Visual inspection of the certificate, as this record clearly shows (R. 25), is designed to ascertain whether the driver of an automobile is authorized by the owner to operate the vehicle "[b]ecause it's—it's a criminal charge if [he's] not" (R. 26). While registration certificates may provide an informal method of ascertaining ownership of a vehicle, that function is one normally considered a "safety" measure. Yet, it was the registration certificate, not the driver's license, that motivated the officers to seize applicant (R. 21, 34). This is clear, not only from the officers' testimony (R. 21-22, 25-26), but from the conceded fact that having produced a valid driver's license prior to discovery of the gun, applicant was not free to move on until he had satisfied the officers that he was in possession of a valid registration permit (R. 28) and therefore not committing a "criminal offense" (R. 26, 41).

that the applicant] could be charged with" (R. 40-41). In reality, the police conduct shown on this record by the officers' own testimony constituted a "seizure" to investigate pollible criminal activity related to the use of an automobile. To be sure, the officers stopped applicant, at least in part, in order to inspect his driver's license and registration certificate. But their motivation for this inspection was not to enforce a "health and safety" regulation but to see if applicant was committing a crime (R. 26, 40-41). This is absolutely clear on the local court record, not only from the officers' own testimony, but from the practice of recording on forms:

> ". . . the name, [and] the address of the person driving, the color of the vehicle, the tag number, the driver's permit number, and the color [and] number of occupants in [the car]" (R. 35).

In this regard, the "spot check" can be viewed as a descendant of the police investigatory arrest described in a study conducted by a special committee appointed by the Commissioners of the District of Columbia. *Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation* (1962). Both "spot checks" and investigatory arrests, by their failure to provide standards that spell out adequate grounds for the seizure of an individual, leave police officers free to halt citizens virtually on whim. *Commissioners' Report, supra*, at 5. In condemning the practice of investigatory arrests, the Committee pointed to the seizure, on clearly unsubstantial grounds, of 6800 persons in the District of Columbia during the two years studied. The impact on each individual seized in an investigatory arrest is severe. However, the adverse impact upon the community of a vastly greater number of investigatory "spot checks" accompanied by the completion of investigatory forms is potent. This local court record, viewed most favorably to the Government, shows that as a matter of constitutional law, the "spot check" of applicant was an investigatory seizure in violation of the Fourth Amendment.

Even if this was a "health and safety" seizure, the local court's constitutional determination could not with-

stand attack. The local court thought the Fourth Amendment inquiry at an end when it concluded that "health and safety" was at stake. 290 A.2d at 582-583; R. 63-65. The Supreme Court's Fourth Amendment jurisprudence flatly rejects that approach. *Camara* v. *Municipal Court*, 387 U.S. 523, 533-534 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967). Indeed, *Terry's* requirement of "articulable suspicion" for police-citizen street encounters flows directly from *Camara's* holding that salutory reasons for a search or a seizure do not remove conduct from Fourth Amendment scrutiny altogether, although such reasons may justify an "intermediate response" to Fourth Amendment standards of reasonableness. *Terry* v. *Ohio*, 392 U.S. 1 (1968). "Health and safety" considerations, assuming that such exist in this case, are merely factors to be balanced with the fundamental rights protected by the Fourth Amendment in assessing the constitutional reasonableness of a particular intrusion.

Of course, there are obvious safety considerations involved in the operation of automobiles, and we do not contend that driver's license statutes are not related to a public safety purpose. Nor do we contend that the Fourth Amendment prohibits any and all efforts by police to ensure compliance with licensing regulations and statutes. We do contend, however, that the means by which the police seek to achieve this public safety purpose must be carefully balanced against the obvious potential of serious Fourth Amendment incursions.

The term "spot check", we respectfully submit, hinders, instead of aids, Fourth Amendment analysis. We challenge only the "spot check" shown on this record whereby: (1) police officers are told to make such checks (R. 19, 35); (2) the officer making the decision to seize appellant is furnished on standards on which that decision is to be based and is under the impression that "this is left up to each individual officer" (R. 19); (3) this same officer selects rented automobiles because of the possibility of a "criminal charge" for driving an overdue car (R. 25-26); and (4) the officers are instructed to complete informal forms prepared by the Special Operations Division which are handed in to the division following "spot checks" (R. 35-36). That conduct, we submit, is violative of the Fourth Amendment's requirement of reasonableness. *Commonwealth* v. *Swanger*, —— Pa. ——, 300 A.2d 66 (1973); *cf. Gomez* v. *Wilson*, 323 F. Supp. 87 (D.D.C. 1971), *remanded*, —— U.S.App.D.C. ——, —— F.2d —— (1973). The holding which we seek will not, of course, outlaw all police efforts to engage in *bona fide* non-selective "spot checks" of automobiles;[21] nor would it necessarily outlaw selective "spot checks" conducted in accordance with announced standards which pass muster under the Fourth Amendment's reasonableness standard. Cf. *Gomez* v. *Wilson*, *supra*; *United States* v. *Lopez*, 328 F. Supp. 1077 (E.D. N.Y. 1971). Finally, the Fourth Amendment holding which we seek does not preclude consideration of the mobility of an automobile as *a* factor in judging the constitutional validity of "articulable suspicion" for a particular vehicle stop,[22] for on this record it is conceded that the officers had no factual information whatever save the fact that applicant was lawfully operating an automobile on the public street.

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[21] Compare *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967); Comment, *Interference with the Right to Free Movement: Stopping and Search of Automobiles*, 51 Cal.L.Rev. 907 (1963); Note, *Use of Police Roadblocks to Inspect Licenses*, 37 Conn.B.J. 486 (1963); Note, *The Driver's License Display Statute: Problems Arising from its Application*, 1960 Wash.U.L.Q. 279. See *City of Miami* v. *Aronovitz*, 114 So.2d 784, 787 (Fla. 1959); *Commonwealth* v. *Mitchell*, 355 S.W.2d 686, 687 (Ky., 1962); *Edwards* v. *State*, 319 P.2d 1021, 1026 (Okla. 1957).

[22] *United States* v. *Fallon*, 457 F.2d 15 (10th Cir. 1972); *Young* v. *United States*, 140 U.S.App.D.C. 333, 336-337, 435 F.2d 405, 408-409; *United States* v. *Madril*, 445 F.2d 827 (9th Cir. 1971), *vacated on other grounds*, 404 U.S. 1010; *United States* v. *Thompson*, 420 F.2d 536 (3d Cir. 1970); cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Preston* v. *United States*, 376 U.S. 364 (1964).

Conclusion

For the foregoing reasons, the Court should issue the writ of habeas corpus.

Respectfully submitted,

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[The Supreme Court Appendix to the briefs in *Palmore* v. *United States*, No. 72-11 which was appended to this application has been omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. HC 31-73

[Filed May 16, 1973, James F. Davey, Clerk]

ROOSEVELT PALMORE, PETITIONER

vs.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, THE ATTORNEY GENERAL OF THE UNITED STATES, DIRECTOR, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, RESPONDENTS

ORDER DIRECTING RESPONDENT
TO SHOW CAUSE

It is this 16th day of May, 1973, ORDERED that the respondent either in person or by counsel appear in the Court on or before the tenth day after service of a copy of this order and of the petition upon him and make return to said petition and show cause, if any he has why the Writ of Habeas Corpus should not issue.

IT IS FURTHER ORDERED that the respondent serve on the petitioner by mail a copy of his answer to this rule.

/s/ Matthew F. McGuire
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 31-73

[Filed Jun. 4, 1973, James F. Davey, Clerk]

ROOSEVELT PALMORE, PETITIONER

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, THE ATTORNEY GENERAL OF THE UNITED STATES, DIRECTOR, D.C. DEPARTMENT OF CORRECTIONS, RESPONDENTS

RETURN AND ANSWER TO ORDER TO SHOW CAUSE

Come now the respondents by their attorney, the United States Attorney for the District of Columbia, and assert as follows:

The extended procedural background of this case is set forth in full in petitioner's pleadings. Briefly, petitioner was convicted of carrying a dangerous weapon (felony) in violation of 22 D.C. Code 3204 in the Superior Court. He appealed and the conviction was affirmed by the D.C. Court of Appeals. *United States* v. *Palmore*, 290 A.2d 573 (1972). An appeal was taken to the Supreme Court. The appeal was dismissed, certiorari granted in part and the decision of the D.C. Court of Appeals, upholding the jurisdiction of the Superior Court to try felonies under the D.C. Code was affirmed. The instant petition followed. For the reasons set forth in the attached memorandum, respondents pray that the Order to Show Cause be discharged and the petition for a writ of habeas corpus be dismissed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 31-73

[Filed Jun. 4, 1973, James F. Davey, Clerk]

ROOSEVELT PALMORE, PETITIONER

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, THE ATTORNEY GENERAL OF THE UNITED STATES, DIRECTOR, D.C. DEPARTMENT OF CORRECTIONS, RESPONDENTS

MEMORANDUM OF LAW

There are but two questions pertinent to the instant inquiry. (1) Has Congress limited the power of the United States District Court for the District of Columbia to hear collateral attacks on Superior Court criminal convictions?; and (2) If so, did they have the power to do it? If the answer to both of these questions is "yes", as we shall contend, then the other arguments raised by petitioner have no bearing on this inquiry. It becomes immaterial, for instance, that "the District of Columbia (would be) the only place in the nation where a criminal defendant can never obtain a ruling on a federal constitutional issue from a federal constitutional court." (Pets.' Br. p. 11). If Congress sought to so distinguish the District of Columbia and had the power to do so, the fact that they may somehow have spoiled the symmetry of the traditional federal state system is not a matter which may be inquired into. We thus turn to the two questions:

I. Under 23 D.C. Code § 110 Congress has vested exclusive post-conviction collateral review of Superior Court convictions in the sentencing court.

One of the major reasons behind the Court Reorganization Act was the recognition that the United States District Court for the District of Columbia was so over-

burdened with essentially local matters that it was unable to effectively carry out the normal functions of a federal district court. The Senate Committee on the District of Columbia summarized the problem in the following terms: (S. Rep. No. 91-405, 91st Cong., 1st Sess. p. 3).

> The burden is acute in the District of Columbia, the seat of the Federal Government, where, in the absence of inordinately crowded dockets (both civil and criminal), a substantial and greater quantum of genuinely Federal litigation might best and conveniently be brought. Yet, at present the median time for civil jury trial in the U.S. District Court for the District of Columbia is nearly double the median for Federal district courts nation-wide. In recent years as many as 12 out of 14 judges of the Federal court in the National Capitol have been assigned full time to the trial of local felony offenses.

It was to remedy this situation that the Court Reorganization Act was passed. The Act consolidated the local trial courts into a new court of general local jurisdiction, the Superior Court of the District of Columbia. See Section 111 of the Act, 84 Stat. 482; D.C. Code § 11-901. The Superior Court was given jurisdiction "of any criminal case under any law applicable exclusively to the District of Columbia" (Section 111 of the Act, 84 Stat. 486; D.C. Code § 11-923(b) and, with the exception of matters over which exclusive jurisdiction is vested in a federal court, "of any civil action or other matter (at law or in equity) brought in the District of Columbia" (Section 111 of the Act, 84 Stat. 484; D.C. Code § 11-921 (a)).[1]

At the same time, the Act eliminated the federal district court's special jurisdiction over local civil matters and reduced its jurisdiction over local criminal offenses to prosecutions involving a federal (United States Code) offense. See Section 111 of the Act, 84 Stat. 476, 477; *D.C. Code* §§ *11-501*, *11-502*. The former appellate jurisdiction of the United States Court of Appeals for the

[1] The jurisdictional changes brought about by the Act were made effective in stages over the course of a transitional period.

District of Columbia Circuit over the judgments of the District of Columbia Court of Appeals, with only a minor exception, was also eliminated (Section 111 of the Act, 84 Stat. 476; *D.C. Code* § *11-301*) and the District of Columbia Court of Appeals was declared to be the "highest court of the District of Columbia," whose judgments are reviewable directly by the Supreme Court (Section 111 of the Act, 84 Stat. 475; *D.C. Code* § *11-102*).

Petitioner now proposes to upset this system by returning to the District Court the power, and hence the duty to collaterally review, pursuant to 28 U.S.C. 2241, all Superior Court criminal convictions. Furthermore, if petitioner's logic is accepted, habeas corpus would also lie in this Court to challenge pre-trial rulings of the Superior Court.[2] This Court would thus once more be overwhelmed with the task of ruling on essentially local matters such as right to be released on bail before trial, admissibility of evidence at trial (as here), etc. Even if collateral review is somehow limited to post-conviction situations it would represent a heavy burden on this Court in derogation of the Court Reform Act. See, *Palmore* v. *United States*, —— U.S. —— 41 L.W. 4528, 4534 (dec. 4-24-73).[3]

The intention of Congress to place both trial and review of local criminal matters exclusively in the Superior

[2] Petitioner contends that § 2241, not 28 U.S.C. 2254, is the appropriate remedy here because he is in federal rather than state custody. If this is so, then the "exhaustion of state remedies" provisions of § 2254 are not applicable as a check on the District Court's power and the writ must be potentially available to *anyone* in "custody" in the District of Columbia whether in a pre-trial, during trial, pending appeal or final conviction status. Thus petitioner seeks to give this Court far *greater* power than any other district court by urging that it can interfere with local proceedings at any time, without the necessity of exhausting local remedies.

[3] *Palmore* noted that the purpose of the Court Reform Act was to

> relieve the regular Art. III courts . . . from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the Court system in a major city and to confine the work of those courts to that which, for the most part, they were designed to do, namely the trial of cases arising under the Constitution and the nationally applicable laws of Congress. Ibid.

Court is clearly expressed in *23 D.C. Code § 110* which creates a remedy exactly equal, by its terms, to that established by 28 U.S.C. 2255 in the federal system. § 110 (g) states that:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section *shall not be entertained by the Superior Court or by any Federal or State Court* if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (Emphasis added).

Petitioner contends that the above section is confusing (Pet's. Br. p. 10). Whatever confusion this section may hold for petitioner, its prohibition against habeas corpus being entertained by "any Federal . . . Court" is explicit. It is also directly on point. Petitioner here seeks to challenge his Superior Court conviction in a Federal District Court without having presented the motion to the Superior Court, his exclusive source of relief by the terms of this section. This he cannot do.

Any confusion about the necessity of applying to the sentencing court for relief may be resolved by reference to the case law interpreting 28 U.S.C. 2255 from which § 110 was derived. It is well settled that if relief is possible under § 2255 such relief must be sought in the sentencing court and habeas corpus relief is not available. 2 C.A. Wright, *Federal Practice and Procedure*, §§ 591, 593; E.g., *Walker* v. *United States*, 429 F.2d 1301 (5th Cir. 1970); *Bandy* v. *Willingham*, 398 F.2d 333 (8th Cir. 1968) *cert. den.* 393 U.S. 1006; See, discussion in *United States* v. *Hayman*, 342 U.S. 205, 210-222 (1952).

The only exception to the rule that a collateral attack upon a conviction or sentence may be brought only in the sentencing court is when relief in that court is "inadequate or ineffective." 28 U.S.C. 2255, *23 D.C. Code* 110(g). Petitioner makes no such explicit claim here, nor

can he. Since *Kaufman* v. *United States*, 394 U.S. 217 (1969) claims alleging illegal searches and seizures may be raised on a § 2255 (and hence a § 110) motion. Furthermore, it is well settled that lack of success on such a motion (and hence, anticipated lack of success as here) does not render the remedy by § 2255 motion "inadequate or ineffective." The only time the motion would be inadequate is when the sentencing court lacks power to grant the relief sought, which is certainly not the case here. *Smith* v. *Reid*, 89 U.S. App. D.C. 272, 191 F.2d 491 (1952); *Boyden* v. *United States*, 463 F.2d 229 (9th Cir. 1972); *Walker* v. *United States*, 429 F.2d 1301 (5th Cir. 1970); *Littero* v. *Parker*, 369 F.2d 395 (3d Cir. 1966).

The statute allows no further exceptions. It is thus true, as petitioner postulates (Pet's. Br. pp. 10-11) that § 110 precludes an Article III court from considering a writ of habeas corpus claiming denial of a federal constitutional right. This, according to the clear wording of the statute, was the intent of Congress. See, Rauh and Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 Am. U.L. Rev. 252, 339-40.[4]

Any doubt that Congress intended to limit the power of this Court more than that of the other Federal District Courts is resolved by reference to *16 D.C. Code 1901*. That section provides that the District Court has power to issue writs of habeas corpus only to federal officers and employees in the District of Columbia, petitions for writs against "any other person shall be filed in the Superior Court . . ." 16 *D.C. Code* 1901.[5] There is no exception for raising "constitutional claims" in the

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[4] "[T]he Court Reorganization Act extinguishes the traditional authority of the federal courts to review local judicial action by the issuance of writs of habeas corpus." Williams, *D.C. Court Reorganization* 59 Geo. L.J. 477, 499; *Bland* v. *Rogers*, 332 F. Supp. 989, 991 (n. 12) (D.D.C. 1971); *Palmore* v. *United States*, 290 A.2d 573, 580 (D.C. App. 1972).

[5] Prior to the 1970 amendment, this section gave the District Court exclusive power to grant the writ against any "officer or other person in whose custody or keeping the party so detained is . . . ."

District Court. If a person is in a local jail in Alabama and feels he has been denied a speedy trial he may, after exhausting state remedies, petition the Federal District Court in that state for habeas corpus against the local officials. By contrast, if he is in the custody of a local official[6] in the District of Columbia he may *not*, by the terms of § 1901, apply to the District Court for relief. The power of the District Court has been curtailed by Congress, the reason being, as discussed above, that the potential petitioner, unlike the man in Alabama or any other state, can have his rights vindicated in another federal court of competent jurisdiction.

II. Congress had the power to create such an exclusive remedy in the Superior Court.

Given the clear intent of Congress to eliminate habeas corpus review in the District Court we must turn to the question of whether Congress had the power to carry out such an intention. This in turn depends upon a determination of whether limiting, except in unusual circumstances, collateral review of a criminal conviction to the sentencing court which was created under Article I, is unconstitutional.

It is true, as petitioner points out (Pet's. Br. p. 11) that such a limitation would make the District of Columbia the only place where a criminal defendant can never obtain a ruling on a federal constitutional issue from an Article III court. Yet, as we shall discuss, *infra*, there is no authority for the proposition that Article III includes an inherent demand that a court created under that provision must hear federal constitutional claims. As the Supreme Court pointed out in *Palmore*, supra, "neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law . . . to be tried in an Art. III court. . . ." 41 L.W. at 4533.

The Superior Court, as decided in *Palmore*, *supra*, is competent to try cases arising under federal law. It

[6] Leaving aside the difficult question of which District of Columbia officials are local and which federal under this statute.

is similarly competent to decide federal constitutional questions under 23 D.C. Code 110 as it is mandated to do by Congress. The Superior Court is not a state court, independent of Congressional control. It is a *federal* court, designed to vindicate federal rights at the local level. It was created for this purpose by Congress and its function is to enforce the laws of Congress. Its judges, like United States District judges, are nominated by the President and confirmed by the Senate. The prosecutors in both courts are from the United States Attorney's Office. The only difference is that Superior Court judges serve a fifteen year term while District judges are appointed for life.[7]

This is not to deny that the scope of the Superior Court's competence differs from that of the District Court. It is true, as the Supreme Court pointed out in this case, that the citizens of the District "must or may resort" to Art. III judges "for consideration of those constitutional statutory matters of general concern. . . ." Ibid, at 41 L.W. 4533.

However, this power of Art. III judges is *not* an inherent constitutional power. It is a power granted by Congress. As such, it can be taken away by Con-

[7] It is clear that while Congress looked for guidance to the state-federal model in defining the respective jurisdictions of the Superior and District Courts it did not find the analogy complete and did not intend it to be so regarded (E.g., in addition to the federal aspects of the Superior Court previously mentioned, United States Marshals serve the Superior Court, prisoners convicted in the Superior Court are remanded to the custody of the Attorney General, Superior Court felony arrest warrants can be served throughout the entire United States, the Federal Rules of Criminal and Civil Procedure unless modified or otherwise provided in 23 D.C. Code are applicable in the Superior Court, 11 *D.C. Code* 946; and St. Elizabeths Hospital, a federal institution, is available for examination and commitment of persons mentally incompetent for trial or found not guilty by reason of insanity in the Superior Court.

In short, it is apparent that Congress had in mind "the practical objective of streamlined, efficient administration of justice in the District rather than providing the citizens of the District with the benefits of the dual court system familiar to the states." Williams, *District of Columbia Court Reorganization*, 1970, 59 Geo. L.J. 477, 511 (1971).

gress. As argued in Part I, *supra*, 23 *D.C. Code* 110(g) takes away the power of Art. III judges to entertain a collateral attack on a Superior Court conviction.

Indeed Congress has frequently curtailed, or failed to grant, various powers to the Art. III courts. As Chief Justice Marshall stated unequivocally in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) ". . . [T]he power to award the writ by any of the courts of the United States must be given in written law." [8] (Emphasis added.) Indeed, prior to an Act of Congress in 1867 (See 14 Stat. 385) the federal courts had no power to issue the writ to anyone in state custody. 1 Stat. 81; See discussion in *Kaufman* v. *United States*, 374 U.S. 217, 221 (1969).

In *Glidden Company* v. *Zdanok*, 370 U.S. 530, 551 (1962) the Supreme Court observed that

> The great constitutional compromise that resulted in agreement upon Art. III, § 1, authorized but did not obligate Congress to create inferior federal courts. . . . Once created, they passed almost a century without exercising any very significant jurisdiction. . . . Throughout this period and beyond it up to today, they remained constantly subject to jurisdictional curtailment.

The power of Congress to limit and control the jurisdiction of the federal courts has been exercised on other occasions. For example, and particularly pertinent in the present context, when Congress created the Circuit Courts of Appeals in 1891, the act establishing the courts did not authorize them to issue writs of habeas corpus, and the Supreme Court accordingly held that in the absence of a congressional grant of jurisdiction, they had no authority "to issue original and independent writs

[8] For other cases in which the Supreme Court stated that the jurisdiction of federal courts (except the Supreme Court) to issue writs of habeas corpus is surely statutory, See, *Ex parte Dorr*, 3 How. 104, 105 (1845); *Ex parte Parks*, 93 U.S. 18, 22 (1876); Ex parte Hung Hang, 108 U.S. 552 (1883); *In re Burris*, 136 U.S. 586, 591 (1890).

of *habeas corpus*." *Whitney* v. *Dick*, 202 U.S. 132, 137 (1906). Moreover, it is clear that Congress may not only limit the jurisdiction it vests in inferior Article III courts, but it also may withdraw jurisdiction from such courts and even abolish the courts themselves.[9] In 1911, for example Congress abolished the Circuit Courts which it had created in 1789 and thereby withdrew all of their jurisdiction. Accordingly, the Supreme Court held that the remaining circuit judges, whose offices were created in 1869 but whose courts had been abolished, had no authority to issue writs of habeas corpus under the habeas statute. *Craig* v. *Hecht*, 263 U.S. 255, 273 (1923).

This power of Congress to limit the jurisdiction of a United States District Court was exercised again in 1970 by the enactment of 16 *D.C. Code* § 1901(c) (Supp. V., 1972) in the Court Reform Act. That provision is also the result of an exercise by Congress of its power under the District Clause, Article I, Section 6, Clause 17 of the Constitution, to "exercise exclusive Legislation *in all cases whatsoever*, over such District (not exceeding ten Miles square) as may . . . become the Seat of the Government of the United States" (emphasis added), a power independent of any limitation imposed by Article III of the Constitution. *Glidden Company* v. *Zdanok*, *supra*; *O'Donoghue* v. *United States*, 289 U.S. 516, 545-546 (1933); Kendall v. United States, 12 Pet. 525, 619 (1838).

Prior to February 1, 1971, the effective date of the Court Reform Act, a person in the District of Columbia could seek a writ of habeas corpus under 16 *D.C. Code* § 1901 (1967) and under 28 U.S.C. § 2241. Pursuant to both of these provisions, such a person alleging unlawful restraint was given a habeas remedy in the United States District Court for the District of Columbia. There was no general habeas remedy in the

[9] Cf. Act of March 27, 1868, c.34, § 2, 15 Stat. 44, by which Congress withdrew from the Supreme Court jurisdiction of appeals from habeas decisions by the lower federal courts. This Act was upheld in *Ex parte McCardle*, 7 Wall. 506 (1868).

Court of General Sessions.[10] When Congress amended Section 1901 in 1970, it granted to the successor of the Court of General Sessions a general habeas authority *and* restricted the habeas remedy in the United States District Court for the District of Columbia to allegations of restraint by Federal officials. This action was consistent with the fundamental purpose of the Court Reform Act to create within the District of Columbia two completely self-sufficient and independent court systems, one to handle only "national-federal" litigation, the other to handle all "local-federal" litigation. As pointed out, *supra*, this represents yet another example of both the power and the intention of Congress to limit the District Court's jurisdiction.

The Constitution provides in Art. I § 9 Cl. 2 that "The Privilege of the Writ of Habeas Corpus shall not be suspended. . . ." Congress' placing of collateral review power in the Superior Court does not "suspend" the writ. There is no requirement in the Constitution that the writ, if made available, be made available in a particular kind of federal court. Furthermore, the United States Court of Appeals has explicitly recognized the power of Article I judges to vindicate federal constitutional claims in *Lurk* v. *United States*, 111 U.S. App. D.C. 238, 296 F.2d 360 (1961) aff'd on other grounds sub nom *Glidden Co.* v. *Zdanok*, 370 U.S. 350 (1962) wherein the Court of Appeals held, *en banc*, that an Article I judge could sit on the District Court and perform all of the functions of a District Court judge (including, implicitly, exercising habeas corpus jurisdiction).

Thus, it is apparent that Congress, in an exercise of its inherent power to grant or deny powers to Article III courts has limited the power of the District Court in such a way as to render this Court without jurisdiction to grant the writ in the instant case.

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[10] The only habeas authority granted by Congress to the former Court of General Sessions was limited to its Domestic Relations Branch. See 11 D.C. Code § 1161 (1967).

III. Search and Seizure claims should not be cognizable on collateral attack.

Alternatively, we would urge, as did Justices Powell, Burger and Rehnquist, concurring in the recent case of *Schneckloth* v. *Bustamonte*, —— U.S. ——, 41 L.W. 4726, 4735 (1973) that petitioner's search and seizure claim should not be entertained on a habeas corpus (or § 110) motion.

They state that scholarly research since *Fay* v. *Noia*, 372 426 (1963) on which Kaufman is based, indicates that *Fay's* expansive notion of the scope of habeas corpus review was based on an erroneous view of the history of that writ. 41 L.W. at 4737 They conclude that "[w]here there is no constitutional claim bearing on innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question of whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim." 41 L.W. at 4740. If state habeas corpus were so limited, the equal protection rationale for *Kaufman* infra, would be eroded and federal habeas corpus or § 2255 claims would also be narrowed in scope.

We recognize that this position is in conflict with *Kaufman* v. *United States*, 394 U.S. 217 (1969). However, Justice Blackmun agreed, in *Schneckloth* that *Kaufman* is incorrect but felt the issue wasn't presented in that case. 41 L.W. at 4735. Furthermore, Justice Stewart dissented in *Kaufman*. Thus, there are at least five justices who believe that *Kaufman* is incorrect. Under these circumstances there is authority for disregarding the lame duck Supreme Court precedent.

Thus, in *Perkins* v. *Endicott Johnson Corp.*, 128 F.2d 208, 217-18 (2nd Cir. 1942) the court held that

> Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal

trend in Supreme Court decisions, it is its duty, cautiously, to be sure, to follow—not to resist it.

Similarly, in *Barnette* v. *W.Va. State Board of Education*, 47 F.Supp. 251 (1942) aff'd 319 U.S. 624 (1942) Judge Parker of the Fourth Circuit, sitting on a three-judge court, declined to follow the clear Supreme Court precedent of *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586 (1940) on the grounds that the Supreme Court appeared ready to overrule *Gobitis* (which they did on appeal in *Barnette* itself.) See, also *United States ex rel. Meadows* v. *State of N.Y.*, 426 F.2d 1176, 1181-82 (2nd Cir. 1970) in which the Second Circuit declined to adhere to the "apparently uncompromising dictates" of *Aherns* v. *Clark*, 335 U.S. 188 (1948) in allowing a habeas corpus petitioner to bring his action in a district other than the one in which he was confined. This case was cited with approval in *Braden* v. *30th Judicial Circuit Court of Ky.*, ——, U.S. ——, 93 S.C. 1123 (1973) which overruled *Ahrens*.

Accordingly, we would request this Court to rule that petitioner's search and seizure claim is no longer cognizable in a habeas corpus petition.

IV. The Stop and Search of Petitioner was legal.

Even if this Court believes that it has jurisdiction in the instant case, petitioner's substantive claims lack merit. Here we rely on the opinion of the District of Columbia Court of Appeals (included in petitioner's appendix) and on the Government's brief in this case in the Supreme Court (attached).

Conclusion

For the reasons stated it is respectfully submitted that the order to show cause be discharged and the petition for a writ of habeas corpus be dismissed.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ Earl J. Silbert
EARL J. SILBERT
Principal Assistant U.S. Attorney

/s/ Oscar Altshuler
OSCAR ALTSHULER
Assistant United States Attorney

/s/ Craig M. Bradley
CRAIG M. BRADLEY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing return and answer to show cause has been mailed to attorney for petitioner, Frank Flegal, Esq., Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001, this 4 day of June, 1973.

/s/ Craig M. Bradley
CRAIG M. BRADLEY
Assistant United States Attorney

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* * * *

[Pages 49-56 of the Government's brief filed with this Court in *Palmore* v. *United States*, No. 72-11 headed "The Selective Stop of An Automobile Driver for the Purpose of Inspecting his Driving Permit and Vehicle Registration Certificate Does Not Constitute An Unreasonable Seizure", which was appended to this Return and Answer, has been omitted here]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 31-73

[Filed Jun. 21, 1973, James F. Davey, Clerk]

ROOSEVELT F. PALMORE, PETITIONER

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., RESPONDENTS

PETITIONER'S SUPPLEMENTAL MEMORANDUM

Preliminary Statement

On June 18, 1973, the Court heard oral argument on the application for writ of habeas corpus and took the matter under advisement. One of the issues vigorously contested both in the memoranda of the parties and the arguments of counsel is the jurisdiction of this Court to entertain the application. On June 21, 1973, petitioner's counsel received the current issue of the advance Supreme Court Reports, 93 S. Ct., No. 16, which contains the proposed Federal Rules Governing Habeas Corpus Proceedings. Because these rules have direct bearing on the jurisdictional issue, this supplemental memorandum is tendered solely for the purpose of calling this important additional authority to the Court's attention.

ARGUMENT

Pursuant to appointment by the Chief Justice of the United States, the Advisory Committee on Criminal Rules has studied the administration of habeas corpus applications in the United States District Court and has submitted for consideration and comment its proposed rules. Two of those rules have a vital bearing on the jurisdictional issue now pending *sub judice* before the Court.

In pertinent part, Rule 1 of the Proposed Rules Governing Habeas Corpus Proceedings for the United States District Courts provides:

> "These rules govern the procedure in the United States district courts on applications (a) by persons in custody pursuant to the judgment of a state court for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States . . . ." 93 S. Ct., No. 16, at 34.

The advisory committee's notes makes it plain that proposed Rule 1 is designed, inter alia, to summarize the scope of federal habeas corpus jurisdiction pursuant to 28 U.S.C. §§ 2241, *et seq.* The committee noted:

> "The basic scope of habeas corpus is prescribed by statute. 28 U.S.C. § 2241(c) provides that the 'writ of habeas corpus shall not extend to a prisoner unless * * * [h]e is *in custody* in violation of the Constitution." 28 U.S.C. § 2254 deals specifically with state custody providing that habeas corpus shall apply only 'in behalf of a person in custody pursuant to a judgment of a state court * * *." *Ibid.* (emphasis in the original).[1]

Implementing this general definition of the scope of federal habeas corpus—and dealing directly with the issue which respondents raise here—the advisory committee provided in Rule 13 of its proposed rules:

> "For purposes of these rules the phrase *'state court' includes the Superior Court of the District of Columbia.*" 93 S.Ct., No. 16, at 89 (emphasis added).

It is therefore clear that, contrary to respondents' argument, the advisory committee has taken the view that this Court indeed possesses habeas corpus jurisdiction on application of one in custody pursuant to a judgment of the Superior Court of the District of Columbia who claims that such custody is in violation of the Constitution of

[1] The advisory committee's comprehensive notes on the "custody" requirement point out that petitioner's status on bail pending appeal constitutes "custody" within the meaning of the federal habeas corpus statutes. 93 S. Ct., No. 16, at 35-37. Since the committee prepared its notes, the Supreme Court has agreed. See *Hensley* v. *Municipal Court*, —— U.S. ——, 93 S. Ct. 1571 (1973).

the United States.[2] While, of course, this Court is not bound by proposed rules, we respectfully submit that this construction of the federal habeas corpus statutes, and the relationship between the constitutional and legislative courts in the District of Columbia, should be given great weight in passing upon the jurisdictional issue raised by this habeas corpus application.[3]

Finally, the advisory committee expressly addressed a point which the Court raised during oral argument with regard to the reviewing function of the federal habeas corpus court. In its proposed Rule 8, the committee set forth standards for evidentiary hearings, and in the notes which accompany that proposed rule, the committee pointed out:

> "If dismissal has not been ordered, the court must determine whether an evidentiary hearing is required. This determination is to be made upon a review of the answer, the transcript and record of state court proceedings, and if there is one, the expanded record." 93 S. Ct., No. 16, at 70, citing *Townsend* v. *Sain*, 372 U.S. 293 (1963).

While the local court record, whice is annexed as an appendix to our memorandum of points and authorities, is adequate for resolution of the Fourth Amendment issue tendered, *Townsend* v. *Sain*, *supra*, cited by the advisory committee, speaks directly to the point which the Court posed during oral argument. In that case, Chief Justice Warren, speaking for the Court, said:

[2] The application for writ of habeas corpus filed herein invoked this Court's jurisdiction pursuant to 28 U.S.C. §§ 2241 *et seq.* Since the judicially imposed exhaustion requirement for § 2241 applications is co-extensive with the statutory exhaustion requirement set forth in § 2254, *e.g.*, *Stack* v. *Boyle*, 342 U.S. 1, 6-7 (1951); *United States* v. *Hayman*, 342 U.S. 205, 223 n.40 (1952); *Ex parte Royall*, 117 U.S. 241 (1886), it is clear that this Court's jurisdiction is proper. Under either § 2241 or § 2254, petitioner has exhausted his local remedies and the matter is ripe for federal habeas corpus consideration. *E.g.*, *Brown* v. *Allen*, 344 U.S. 443 (1953); *Roberts* v. *La Vallee*, 389 U.S. 40 (1967).

[3] Among other prominent members of the advisory committee are Circuit Judge Robb and District Judge Gesell. 93 S.Ct., No. 16, at III.

> "Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas. That was settled in Brown v. Allen, supra, 344 U.S. at 506 (opinion of Mr. Justice Frankfurter)." 372 U.S. at 318.

For the reasons set forth in our memorandum of points and authorities, we respectfully submit that an independent application of federal constitutional law to the facts shown in the local court record compels the conclusion that petitioner is in custody in violation of the Fourth Amendment to the Constitution.

Conclusion

The application for a writ of habeas corpus should be granted.

Respectfully submitted,

/s/ Frank F. Flegal
FRANK F. FLEGAL
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(624-8208)
Attorney for Petitioner.

June 21, 1973

Certificate of Service

A copy of the foregoing supplemental memorandum has been delivered to Craig Bradley, Esq., Assistant United States Attorney, United States Courthouse, Washington, D. C. 20001, attorney for respondents, this 21st day of June, 1973.

FRANK F. FLEGAL
/s/ Frank F. Flegal

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1832

[Filed Jan. 28, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

ROOSEVELT F. PALMORE, APPELLANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, *et al.*, APPELLEES

APPELLANT'S MOTION FOR LEAVE TO AMEND JURISDICTIONAL ALLEGATIONS

Pursuant to 28 U.S.C. § 1653, appellant respectfully moves for leave to amend the jurisdictional allegations set forth in his application for writ of habeas corpus by adding to paragraph three thereof the following underscored allegations so that, as amended, the paragraph would read:

> 3. This Court has jurisdiction to entertain this application and issue the writ of habeas corpus as prayed herein pursuant to 28 U.S.C. §§ 2241 *et seq.* Jurisdiction is also invoked under and by virtue of Article I, § 9, cl. 2 and Article III of the Constitution of the United States and 28 U.S.C. § 1651. *Alternatively, this action arises under the Fourth Amendment to the Constitution of the United States, involves an amount in controversy which exceeds the sum of ten thousand dollars ($10,000), and this Court has jurisdiction pursuant to 28 U.S.C. § 1331. There exists between the parties an actual controversy, and this Court has power to declare the respective rights of the parties, and to award such other relief as may be necessary and proper, pursuant to 28 U.S.C. §§ 2201-2202.*

This appeal presents for decision the question of the jurisdiction of the United States District Court to entertain complaints by prisoners who have unsuccessfully contended in the local District of Columbia courts that they are in custody in violation of the Constitution of the United States. In the District Court, appellant bottomed his jurisdicional allegations on the statutory and constitutional power of the Article III courts to award writs of habeas corpus. In this Court, appellees contend that 23 D.C. Code § 110(g) deprives the constitutional courts of jurisdiction to award the writ, although they have conceded that § 110(g) does not deprive those courts of jurisdiction to award other remedies found necessary and appropriate to redress a constitutional violation. Brief for Appellees at 14-15, n. 13. This concession is deemed to be without significance by appellees "since appellant has only petitioned the District Court for a writ of habeas corpus" and thus "the jurisdictional bar of subsection (g) would be sufficient grounds for dismissal of his *cause of action*." *Ibid.* (emphasis added). This latter contention reflects a fundamental misunderstanding of the role of pleading in federal adjudication, for a litigant does not lose his "cause of action" simply because he has not demanded one type of relief instead of another, Rule 54(c), F.R.C.P.,[1] nor does he suffer a "dismissal of his cause of action" merely because his jurisdictional allegations are arguably defective. 28 U.S.C. § 1653. *E.g.*, *Tatum* v. *Laird*, 144 U.S. App. D.C. 72, 76 n.8, 444 F.2d 947, 951 n.8, *rev'd on other grounds*, 408 U.S. 1 (1972); *Jones* v. *Freeman*, 400 F.2d 383, 387 (8 Cir. 1968); *Mantin* v. *Broadcast Music, Inc.*, 248 F.2d 530, 531 (9 Cir. 1957); *Blanchard* v. *Terry & Wright, Inc.*, 218 F. Supp. 910, 913-914 (W.D. Ky., 1963), *aff'd*, 331 F.2d 467 (6 Cir. 1964). Compare *Childs* v. *United States Board of Parole*, —— U.S. App. D.C. ——, —— F.2d —— (No. 74-1052, decided December 19, 1974) (slip op. at 5-7).[2]

[1] Except where inconsistent with a federal statute or prior practice, the Federal Rules of Civil Procedure apply to habeas corpus proceedings. Rule 81(a)(2), F.R.C.P.

[2] The 1948 amendments to 28 U.S.C. § 1653 were made for the express purpose of "permit[ting] amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship as provided by [former] section 399 of title 28, U.S.C., 1940 ed." H.R. Rep. No. 308, 80th Cong., 1st Sess. at A-145 (1947).

We have demonstrated, both in our opening and reply briefs, that the District Court had jurisdiction to entertain appellant's application for a writ of habeas corpus. If this Court agrees, the jurisdictional allegations of appellant's application are not defective, and this motion becomes moot. We also pointed out, however, that the District Court had power to award declaratory and other relief without regard to the availability of the writ of habeas corpus (Appellant's Brief at 16 n.19; Appellant's Reply Brief at 4-12). If, contrary to our argument, the Court concludes that 23 D.C. Code § 110(g) bars habeas corpus relief but accepts the Government's concession that other forms of relief are available in the District Court, the sufficiency of our jurisdictional allegations will be placed in issue. It may be that no additional jurisdictional allegations are needed to support declaratory relief, *Sobell* v. *Attorney General*, 400 F.2d 986, 989 (3 Cir.), *cert. denied*, 393 U.S. 940 (1968), but if the Court concludes otherwise, this motion should be granted so that this case may be decided on its merits.

Because consideration of this motion is inextricably linked with the jurisdictional issues which have been fully briefed by the parties, we respectfully suggest that the Court hold this motion in abeyance pending argument and disposition of this case.

WHEREFORE, if appellant's jurisdictional allegations are deemed defective, this motion should be granted and appellant should be granted leave to amend those allegations as set forth herein.

Respectfully submitted,

FRANK F. FLEGAL
600 New Jersey Avenue, N.W.
Washington, D. C. 20001

Attorney for Appellant

Certificate of Service

A copy of the foregoing motion has been personally delivered to the office of the United States Attorney, United States Courthouse, Washington, D. C. 20001, this 28th day of January, 1975.

FRANK F. FLEGAL
600 New Jersey Avenue, N. W.
Washington, D. C. 20001

Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1832

(Habeas Corpus No. 31-73)

ROOSEVELT F. PALMORE, APPELLANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., APPELLEES

OPPOSITION TO APPELLANT'S MOTION FOR LEAVE TO AMEND JURISDICTIONAL ALLEGATIONS

Appellees respectfully oppose appellant's motion for leave to amend the jurisdictional allegations of his allegations of his initial application for a writ of habeas corpus filed in the United States District Court for the District of Columbia on May 15, 1973.

I

On May 15, 1973, appellant filed an application for a writ of habeas corpus in the District Court along with a memorandum of points and authorities in support of that application. An order to show cause was issued by the court on May 16; the return and answer of the respondents was subsequently filed on June 4. On June 15 appellant filed a reply memorandum. The court heard argument on appellant's application on June 18; appellant later filed supplemental memoranda on June 21 and July 13, 1973. In each of these pleadings appellant's entire effort was directed toward the issuance of a writ of habeas corpus by the District Court.

On July 10, 1974, the Honorable Joseph C. Waddy entered an order discharging the rule to show cause and dismissing appellant's petition for a writ of habeas

corpus. This appeal followed. In his initial brief in this Court appellant asserted that this Court had jurisdiction of his appeal pursuant to 28 U.S.C. § 2253, the provision dealing with the appeal of decisions in habeas corpus proceedings.

Appellant now seeks to amend his initial application to the District Court under 28 U.S.C. § 1653 to allege jurisdiction of that court pursuant to 28 U.S.C. § 1331—asserting a federal question arising under the Fourth Amendment involving more than $10,000 in damages—and, in addition, he requests relief under 28 U.S.C. §§ 2201-2202, the provisions enabling the federal courts to issue declaratory judgments. We strenuously oppose any such amendment.

II

28 U.S.C. § 1653 provides:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Appellant contends in his motion that this provision entitles him at this juncture to amend his initial application for a writ of habeas corpus to include, in the jurisdictional allegations of that petition, an assertion of federal question jurisdiction and a claim for declaratory relief. This position is simply contrary to the controlling case law in this and other jurisdictions.

The purpose of section 1653 is to allow a party to avoid dismissal of his cause of action on purely technical grounds. *Moore* v. *Coats Co.*, 270 F.2d 410, 412 (3d Cir. 1959).[1] However, the amendment which appellant seeks

[1] In *Moore* the court permitted the amendment of a complaint to include an additional party, thereby perfecting venue in the District Court. The court noted that the plaintiff in that action was appearing *pro se*, and since he was unskilled in the law, his pleadings should be liberally construed. 270 F.2d at 411. In the instant case, appellant is represented by very distinguished counsel, as he was in the trial court. Consequently, there is not the same need to make allowances as in the case of a *pro se* litigant. In any event, as we shall show, amendment of the type requested here is improper even under a liberal construction of the statute.

in his pending motion is far more than a mere technical amendment to cure a technical jurisdictional defect. Rather, appellant now seeks to raise new and fundamentally different grounds for the jurisdiction of the District Court. Such an amendment should not be allowed in this Court following dismissal of appellant's action by the District Court.

As the Tenth Circuit noted in *Brennan* v. *University of Kansas*, 451 F.2d 1287, 1289 (10th Cir. 1971):

> The power of the appellate court to correct defective jurisdictional allegations [under 28 U.S.C. § 1653] concerns defects of form, not substance. [Footnote omitted.]

An appellate court "cannot consider a 'new issue, not raised by the pleadings in the District Court or considered by it,' whether raised by motion to amend a complaint or otherwise." *First National Bank of Cincinnati* v. *Pepper*, 454 F.2d 626, 636 (2d Cir. 1972) (citation omitted); *cf. Champ* v. *Atkins*, 76 U.S. App. D.C. 15, 16-17, 128 F.2d 601, 602-603 (1942).[2]

[2] The cases relied upon by appellant in his motion do not support his contention on close examination. In both *Tatum* v. *Laird*, 144 U.S. App. D.C. 72, 444 F.2d 947, *rev'd*, 408 U.S. 1 (1972), and *Childs* v. *United States Board of Parole*, D.C. Cir. No. 74-1052, decided December 19, 1974, this Court relied upon a provision of the District of Columbia Code, 11 D.C. Code § 521, which established the United States District Court for the District of Columbia as a court of general equity jurisdiction, and noted, therefore, that, even if this jurisdictional basis was not properly pleaded, the local court clearly had jurisdiction over the subject matter of the proceeding. Since the District of Columbia Court Reform and Criminal Procedure Act of 1970 took effect on February 1, 1971, however, the jurisdictional basis relied upon in those decisions no longer exists. *See Tatum* v. *Laird*, *supra*, 144 U.S. App. D.C. at 75 n.5, 444 F.2d at 950 n.5.

Similarly, *Mantin* v. *Broadcast Music, Inc.*, 248 F.2d 530 (9th Cir. 1957), and *Blanchard* v. *Terry & Wright, Inc.*, 218 F. Supp. 910 (W.D.Ky. 1963), *aff'd*, 331 F.2d 467 (6th Cir. 1964), were cases in which the facts pleaded or presented to the court showed that it had jurisdiction, but the pleadings did not properly allege the jurisdictional bases.

In the instant case, we submit, appellant is not simply attempting to cure an imperfect pleading. Rather, he is no presenting to this

Moreover, there is an additional ground on which appellant's motion should be denied: it is clearly unlikely that the amendment which appellant now seeks to offer will avail him in his cause of action. *E.g.*, *Brennan* v. *University of Kansas*, *supra*, 451 F.2d at 1289. Appellant asserts that, if he is granted leave to amend his initial petition, he may well prevail in an action for monetary damages within the court's federal question jurisdiction under 28 U.S.C. § 1331. In addition, he argues, he should be able to obtain declaratory relief even if the District Court lacks habeas corpus jurisdiction.

With respect to appellant's potential suit for monetary damages, while he could conceivably recover for the alleged deprivation of his constitutional rights, the likelihood of such a recovery on the facts of this case is so remote as to defy quantitative analysis. It must be remembered that the police officers were acting in accordance with prior precedent when they stopped appellant,[3] and their actions were later approved by the local court of appeals.[4]

Appellant argues at some length in his reply brief that his action could have been maintained under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. This position, however, is simply not in accord with the relevant authority. As this Court clearly stated in *Clark* v. *Memolo*, 85 U.S. App. D.C. 65, 68, 174 F.2d 978, 981 (1949):

> The action for declaratory judgment is not suitable and does not lie in the District of Columbia in such cases as a substitute for a motion to vacate or to correct the sentence in the court where it was imposed, or as a substitute for habeas corpus in the district where the unlawful detention occurs, or as a substitute for a new trial or appeal.

Court an entirely new jurisdictional basis for his claim. Such tardy introduction of legal theories which were never presented to the District Court should not be allowed.

[3] *See Mincy* v. *District of Columbia*, 218 A.2d 507 (D.C. Ct. App. 1966).

[4] *Palmore* v. *United States*, 290 A.2d 573, 580-584 (D.C. Ct. App. 1972).

See also Ruip v. *Kentucky*, 400 F.2d 871, 872 (6th Cir. 1968), *cert. denied*, 395 U.S. 911 (1969); *United States ex rel. Bennett* v. *Illinois*, 356 F.2d 878 (7th Cir.), *cert. denied*, 384 U.S. 946 (1966).

It is clear, as we have argued in our brief, that appellant has an appropriate statutory remedy under 23 D.C. Code § 110 to challenge the legality of his conviction. Under such circumstances he should not be allowed to seek declaratory relief and thereby avoid the statutory remedy which Congress has provided. *Cf. Clausell* v. *Turner*, 295 F. Supp. 533, 536-537 (S.D.N.Y. 1969). Particularly in the instant case, because Congress has specifically precluded any court other than the Superior Court from jurisdiction to consider collateral attacks on judgments of conviction entered in that court, it would totally frustrate the congressional purpose to allow appellant to bring an action for declaratory relief in the District Court.[5]

[5] Despite appellant's assertions to the contrary, there is no authority to support his contention that declaratory relief should be available to him under the circumstances of this case. Rather, as the cases cited above show, collateral relief under 23 D.C. Code § 110 is his exclusive remedy. The cases cited in appellant's reply brief (Appellant's Reply Brief at 8-12) do not support his contention. For example, *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956), and *Shaugnessy* v. *Pedreiro*, 349 U.S. 48 (1955), were immigration cases involving challenges to administrative orders of deportation or exclusion. The Supreme Court held that such administrative orders were subject to review either in actions for declaratory judgments or on petitions for writs of habeas corpus. Such declaratory relief as was available was held to emanate from the Administrative Procedure Act. This Court similarly held in *Hurley* v. *Reed*, 110 U.S. App. D.C. 32, 288 F.2d 844 (1961), that a decision of the United States Board of Parole could be challenged in an action for a declaratory judgment. The important distinction between these cases and the instant case, however, which appellant ignores, is that these cases involved decisions of an administrative agency and thus were amenable to declaratory relief because of the Administrative Procedure Act, whereas the instant case involves no administrative decision. For a helpful discussion of this distinction, *see Clausell* v. *Turner*, *supra*, 295 F. Supp. at 536-537.

[Footnote continued on page 56]

Thus it is plain not only that appellant's proposed amendment is improper under 28 U.S.C. § 1653, but also that, even if his motion were granted, his amendment would not avail him in his cause of action.

WHEREFORE, appellees respectfully submit that appellant's motion for leave to amend jurisdictional allegations should be denied.

/s/ Earl J. Silbert
EARL J. SILBERT
United States Attorney

/s/ John A. Terry
JOHN A. TERRY
Assistant United States Attorney

/s/ Albert H. Turkus
ALBERT H. TURKUS
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing Opposition has been mailed to counsel for appellant, Frank F. Flegal, Esquire, 600 New Jersey Avenue, N.W., Washington, D.C. 20001, this 3rd day of March, 1975.

/s/ Albert H. Turkus
ALBERT H. TURKUS
Assistant United States Attorney

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[5] [Continued]

Appellant also cites *Rose* v. *McNamara*, 252 F. Supp. 111 (D.D.C. 1966), *aff'd*, 126 U.S. App. D.C. 179, 375 F.2d 924 (1967), in support of his contention that declaratory relief should be available to him. While there is no discussion in either of the *Rose* decisions of the reason why declaratory relief was thought to be available, it would appear that declaratory relief was appropriate rather than habeas corpus in that particular case because the petitioner was not incarcerated but had only been fined as a result of her conviction. At the time of that decision, prior to the establishment of expanded notions of "custody" by the Supreme Court, it is likely that habeas corpus would not have been available to the petitioner.

ATTACHMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

[Filed, May 21, 1975; Hugh E. Kline, Clerk]

[Filed, Sep. 3, 1975; James F. Davey, Clerk]

Habeas Corpus #31-73

No. 74-1832

ROOSEVELT F. PALMORE, APPELLANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL.

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

On consideration of appellant's motion for leave to amend jurisdictional allegations, and of the opposition thereto, it is

ORDERED by the Court, *en banc*, that appellant's motion for leave to amend jurisdictional allegations is granted.

Per Curiam

A true copy:

Test: Hugh E. Kline, Clerk
United States Court of Appeals
for the District of Columbia Circuit

By: /s/ Catherine Carr, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 31-73

[Filed, Sep. 3, 1975; James F. Davey, Clerk]

ROOSEVELT F. PALMORE, APPLICANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., RESPONDENTS

APPLICANT'S AMENDED JURISDICTIONAL ALLEGATIONS

Pursuant to 28 U.S.C. § 1653, and in accordance with the leave granted to applicant by the United States Court of Appeals for the District of Columbia Circuit, applicant hereby amends the jurisdictional allegations set forth in paragraph 3 of his application for writ of habeas corpus as follows:

3. This Court has jurisdiction to entertain this application and issue the writ of habeas corpus as prayed herein pursuant to 28 U.S.C. §§ 2241 *et seq.* Jurisdiction is also invoked under and by virtue of Article I, § 9, cl. 2 and Article III of the Constitution of the United States and 28 U.S.C. § 1651. Alternatively, this action arises under the Fourth Amendment to the Constitution of the United States, involves an amount in controversy which exceeds the sum of ten thousand dollars ($10,000), and this Court has jurisdiction pursuant to 28 U.S.C. § 1331. There exists between the parties an actual controversy, and this Court has power to declare the respective rights of the parties, and to award such

other relief as may be necessary and proper, pursuant to 28 U.S.C. §§ 2201-2202.

/s/ Frank F. Flegal
FRANK F. FLEGAL
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Attorney for Applicant

II. *Swain* v. *Pressley*

RELEVANT DOCKET ENTRIES

Date	Entries	Judge
May 11, 1973	Petition for Writ of Habeas Corpus c/s 5/9/73.	
May 11, 1973	Petition for leave to file and prosecute in forma pauperis; Affidavit.	
May 11, 1973	Order authorizing filing and directing respondent to show cause on or before the 5th day after service. (signed 5/10/73).	Judge McGuire
May 11, 1973	Rule to show cause & copies issued to: Swain ser: 5/15/73 U.S. Attorney ser: 5/15 Corporation Counsel ser: 5/16	
May 21, 1973	Answer by respondent to petition for writ of Habeas Corpus and Rule to show cause; c/m 5/21/73. Appearance of Donald F. Rosendorf, Asst. Corp. Counsel.	
May 23, 1973	Order for writ of habeas corpus returnable June 11, 1973 at 10:00 A.M.; requesting Glenn L. Archer to represent petitioner.	Judge McGuire
May 25, 1973	Writ of Habeas Corpus & copies issued; ser: not served.	
June 6, 1973	Supplemental return and Answer of respondent to Rule to show cause; c/m 6-6-73. Appearance of Tobey W. Kaczensky.	
June 8, 1973	Order continuing hearing on cause set for June 11, until 9:30 A.M. July 9, 1973.	Judge Sirica

* * * *

Date	Entries	Judge
July 9, 1973	Reply of petitioner; Exh. A, B, C; c/sr 7/9/73	
July 12, 1973	Answer of respondent to reply of petitioner; p/s 7/12/73; Exhibit.	
July 18, 1973	ORDER discharging rule to show cause; dismissing petition. Court does not have jurisdiction over this matter by virtue of 23 D.C. Code 110(g).	Judge Gesell
July 25, 1973	ORDER dated 7-24-73 appointing Glenn L. Archer, Jr., counsel for deft. Nunc Pro Tunc 5-23-73. Filed. #263370	Judge Gesell
Aug. 13, 1973	NOTICE of Appeal by petitioner from order of July 18, 1973. Copies to: U.S. Attorney; Corporation Counsel; U.S.C.A.; 67371	

* * * *

Jan. 22, 1974	CERTIFIED copy order U.S.C.A. appointing Robert Weinberg, Esq. as counsel to represent appellant.	
Nov. 12, 1974	MEMORANDUM clarifying Court's Order of 7/18/74 dismissing petition for issuance of writ of habeas corpus	Judge Gesell
Nov. 1, 1974	CERTIFIED copy order of U.S.C.A. remanding record to U.S.D.C. for clarification of the order dated July 18, 1974.	
Nov. 14, 1974	SUPPLEMENTAL RECORD on remand returned to U.S.C.A. receipt askn. (73-1975).	
Feb. 3, 1975	TRANSCRIPT of proceedings July 16, 1973: Pages 1-19. (Ida Z. Watson reporter).	
July 31, 1975	Certified copy of judgment U.S.C.A. reversing and remanding cause to the U.S. District Court. Opinion attached.	

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 30-73

[Filed May 1, 1973, James F. Davey, Clerk]

JASPER C. PRESSLEY, Box 12, Lorton, Virginia 22079,
PETITIONER

v.

C. L. SWAIN, Superintendent, Lorton Correctional Complex, Box 25, Lorton, Virginia 22079, RESPONDENT

PETITION FOR ISSUANCE OF
WRIT OF HABEAS CORPUS

Comes now, the Petitioner, Jasper C. Pressley, and in accordance with Title 28, U.S.C. Sections 2241-2243, respectfully moves this Honorable Court to issue a writ of Habeas Corpus and for cause states as follows:

1. In February 1971, the Petitioner's house was searched in compliance with an affidavit in support of a search warrant for the entire premises of 6809 9th Street, N.W. in Washington, D.C. for the charge: RECEIVING STOLEN PROPERTY IN VIOLATION OF THE DISTRICT OF COLUMBIA CODE, TITLE 22, SECTION 2205. In that, two (2) Metropolitan Police Badges, one (1) purported to have been stolen in January 1970, *prior to the employment of the Petitioner* at the Pilot District Project and the other in October 1970 from the locker room of the Third District Headquarters, where the *Petitioner never been nor had access*, and one (1) *IBM Electric Typewriter serial number 6238665*, purported to have been reported stolen from the Pilot District Project's office between the hours of 7:30 p.m. and 11:00 a.m. on Friday and Saturday, November 13 and 14th respectively. An IBM Selectric Typewriter serial number 5613255 was taken from the premises of the Petitioner. A call was made

to the office of the Pilot District Project by one Lt. Keahon from the Petitioner's premises, to check on typewriter #5613255. There was no report of such a typewriter being stolen or missing from the Pilot District Project but said typewriter was taken by said Police Lieutenant for the purpose of checking on it. The Petitioner was not arrested nor was he detained for interrogation.

2. On February 9, 1971, the Petitioner was indicted secretly by a Grand Jury of the District of Columbia Superior Court on charges of; and in violation of: Grand Larceny (22 D.C. Code 2201), Larceny from the District of Columbia Government (22 D.C. Code 2206) and Receiving Stolen Property (22 D.C. Code 2205). After a trial by jury before the Honorable Tim C. Murphy on April 20, 21 and 22, 1971, the Petitioner was found guilty of Grand Larceny and Larceny from the District of Columbia Government and not guilty of Receiving Stolen Property. On October 1, 1971, the court sentenced the Petitioner to concurrent prison terms of thirty-two to ninety-six months for grand larceny and twenty months to five years for larceny from the District of Columbia Government. Petitioner appealed from the conviction whereby his court appointed Attorney Michael F. X. Dolan, presented argument on *PERJURIOUS TESTIMONY*, an issue not presented at trial level. On May 22, 1972, the District of Columbia Court of Appeals entered a judgment affirming the conviction in *Pressley* v. *United States*, No. 6063, stating, "No constitutional issues were involved."

3. June 5, 1972, the Petitioner filed a motion for a new trial *pro se* claiming *inter alia* that he was denied the effective assistance of counsel. June 6, 1972, Judge Murphy denied the motion without a hearing. An appeal followed.

4. The Petitioner's argument was and remains, that:

THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT IN THAT TRIAL COUNSEL'S GROSS INCOMPETENCE BLOTTED OUT THE ESSENCE OF A SUBSTANTIAL DEFENSE, AND PETI-

TIONER'S CONVICTIONS BEING BASED, IN PART, UPON PATENTLY PERJURED TESTIMONY.

Ineffective assistance of trial counsel, to be violative of the Constitution, must be so grossly incompetent as to blot out the essence of a substantial defense. *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 379 F. 2d 113 (1967); *Scott* v. *United States*, 138 U.S. App. D.C. 339, 427 F. 2d 609 (1970). In the case before this Court, trial counsel acted in such a manner.

The most flagrant illustration of trial counsel's incompetence was his failure to move to suppress as evidence the typewriter allegedly stolen by Appellant. Facing a similar fact situation, the Supreme Court of California, speaking through Justice Traynor, held that "it is counsel's duty to investigate carefully all defenses of fact and of law that may be available to the Defendant, and if his failure to do so results in withdrawing a crucial defense from the case, the Defendant has not had the assistance to which he is entitled. *People* v. *Ibarra*, 34 Cal. Rptr. 863, 386 P. 2d 487, 490 (1963). In the *Ibarra* case, the Supreme Court overturned a conviction because trial counsel failed to voice any objection to the admission of heroin allegedly taken from Defendant's person. A motion to supress in the present case could have been based upon lack of probable cause for issuance of a search warrant and on improper execution of said warrant.[1] The probable cause issue was important because the Affidavit in support of said warrant was based on the testimony of one Roman S. Dixon, who was arrested on January 27, 1971 and charged with grand larceny, a charge to which he admitted his guilt. Mr. Dixon also admitted stealing a Metropolitan Police Officer's badge which he utilized during the commission of said offense. After he was arrested and had issued a confession, he assisted the police in recovering property which had been stolen by him. This according to Officer Richard Hayden and the Superior Court Judge

[1] See Grand Jury Minutes dated February 8, 1971, line 8 thru 16, and Lt. Keahon's testimony at (Tr. 110-111) in addition to Dixon's (Tr. 72-73). Each has a different statement.

who authorized the issuance of the search warrant caused Roman Dixon to be a reliable informer. A man who steals property from others, and after he is arrested and has admitted to the larceny, helps the police recover the property which he has stolen, suddenly becomes a reliable informer. The United States Supreme Court has said that "although an Affidavit may be based on hearsay information . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the [typewriter] was where he claimed it was, and some of the underlying circumstances from which the officer concluded the informant . . . was credible or his information reliable." *Aguilar* v. *Texas*, 378 U.S. 114 (1963). The Affidavit in this case was not corroborated in any way by outside sources, and yet the issuing magistrate felt that this confessed criminal was credible and reliable. See *Spinelli* v. *United States*, 393 U.S. 410 (1968). It is also clear that this case did not involve danger to either police officers or the innocent public, thereby reducing the standards necessary for a search and seizure. *Murphy* v. *United States*, D.C. Appeals No. 6226 (Aug. 10, 1972); *Adams* v. *Williams*, —— U.S. ——, 32 L.Ed. 2d 612 (1972). At the very least, there is a substantial question as to whether there were proper grounds for issuance of a search warrant, and yet no motion to suppress, here basic to the essence of a criminal defense, was ever raised by trial counsel.[2]

There were other grounds which could have been raised at the trial level in a motion to suppress evidence. A typewriter, in and of itself, is neither an unusual household item, nor an illegal one. To describe the typewriter as an IBM Electric, Serial Number 6238665 is specific enough, but in fact, the typewriter seized from the prem-

[2] See Affidavit and Search Warrant. Police Badges missing *prior* to employment of Petitioner at Pilot District Project (EMPHASIS ADDED). Petitioner was not detained upon seizure of typewriter #5613255 and if it had been ascertained that said typewriter was stolen or missing, the Petitioner would have been arrested upon the seizure. See Officer Haydn statement before Grand Jury dated 8 February 1971, line 8-16.

ises was an IBM *Selectric*, Serial Number 5613255. Thus there was an improper execution of the search warrant, particularly in light of the fact that the object of the search was a typewriter, a common household item. The issue before this Court is not whether a motion to suppress would have been successful, but rather that because it was not made at the trial level, it can not be raised on appeal, and thus Appellant has been denied the assistance of counsel guaranteed under the Constitution.

There were other ways in which trial counsel was ineffective. A crucial question in any trial for the charge of grand larceny is the value of the allegedly stolen property. In the case before this Court, a government witness testified that the typewriter in question cost $495.00 when purchased in 1969. However, there was no testimony to the precise value of the property at the time it was stolen and there were no vouchers of cost nor of ownership presented at trial as evidence. Trial counsel failed to seek an expert witness who might testify to a substantially lower valuation or if the typewriter was in ordinary working condition to justify a charge of grand larceny. This was ineffective of counsel.[3] A. K. Ramson v. U.S. (1964, 337 F. 2d 550, 119 U.S. App. D.C. 154, states that "Without evidence of value of article involved, charge of Grand Larceny is inadequate to sustain finding of jury that it was of value of $100 or upward

The counsel also failed to have any expert fingerprinter to verify that finger prints could have been taken off the typewriter in opposition to governments argument that no fingerprints could be taken from the typewriter, trial counsels concurrence would have revealed the petitioner's innocence.

Trial counsel failed to object at Voir Dire when a prospective juror rose in the open court and stated that she had seen petitioner in court on a previous occasion. Trial counsel did not object to the indictments handed

[3] In Grand Larceny prosecutions, instructions on petit larceny is unnecessary where *NOTHING IN EVIDENCE* indicates value of less than $100. W. Chew v. U.S. (1962, 298 F.2d 334, 112 U.S. App. D.C. 6).

down by the Grand Jury when it appeared on the face of two separate indictments that the signatures of the United States Attorney for the District of Columbia were patently different.[4] Further, counsel made no serious attempt to impeach the witness Dixon with regard to the spraypaint on the typewriter, when it was clear that this testimony was in conflict with other government witnesses.[5]

The ineffective assistance described above is not merely a reassessment by hind sight of the strategy decisions of defense counsel. Under the *Bruce* case, supra., this would not be a proper standard for a reviewing court. Nor is this case similar to *Edwards* v. *United States*, 103 U.S. App. D.C. 152, 256 F. 2d 707 (1958), because that case involved a plea of guilty rather than an extensive criminal trial, and the decision to plead guilty was arrived at after discussion between the Defendant and his counsel. A distinction must be made between improvident strategy and lack of investigation, when the latter amounts to ineffective assistance of counsel. In *Coles* v. *Peyton*, 389 F. 2d 224 (1968), as in this instant case before the Court, the United States Court of Appeals for the Fourth Circuit held that the Petitioner was denied effective assistance of counsel when his trial counsel failed to investigate matters which were crucial to the defense of a charge of rape in the State of Virginia.

The opinion of this Court should not affect or be affected by the fact that trial counsel was retained by the Petitioner. A double standard of effectiveness required under the Constitution would be inconceivable. Because the petitioner seeks his own counsel should not relax any Constitutional protection to which he is otherwise en-

[4] Count 1 & 2 are identical and the signature of the DA is *FORGED*; in that no initial indicates the signee even if authorization was given. As the indictment stands, anyone, anywhere can sign the DA's signature without indicating *WHO* signed it. Further, if the Ass't are authorized to sign the DA's signature, WHY did the DA sign #9227-71 himself?

[5] See Dixon (Tr. 72) Keahon (Tr. 107-08) *PERJURED TESTIMONY*.

titled. Holland v. Boles, 225 F. Supp. 863 (N.D.W.Va., 1963)

CONCLUSION

The Petitioner respectfully urges this Court to grant his petition and order the Respondent in this cause to show the legality of the detainment of the Petitioner, and, should the allegations and facts herein presented prove as stated, Petitioner humbly prays that this Court will move as law and justice provide to discharge the Petitioner from confinement. Further, it is arguable that the trial judge should have recognized the illegal nature of the seizure and raised the issue himself. When essential integrity of the judicial process is at state, an experienced trial judge should take the necessary action to assure a fair hearing. That the trial Judge has that power is implied in many decisions regarding the effective representative of counsel which holds that the incompetency of counsel must be of the sort of which the trial court may take cognizance and which it has a duty to correct. Davis v. Bomer, 349 F. 2d 84 (6th Cir.) Cert. Denied 382 U.S. 883, 86 S. Ct. 177, 152 L Ed 2d 124 (1965); U.S. v. ex rel Darcy v. Hardy, 202 F. 2d 407 (3rd Cir. 1953).

Respectfully submitted,

/s/ Jasper C. Pressley
JASPER C. PRESSLEY
Box 12
Lorton, Virginia

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing Petition for Leave to File and Prosecute and Petition for the Issuance for a Writ of Habeas Corpus in Forma Pauperis, was mailed, postage prepaid to the Attorney for the District of Columbia, at his office, U. S. Courthouse, Washington, D. C. this 9th day of May 1973.

/s/ Jasper C. Pressley

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 30-73

[Filed, May 11, 1973; James F. Davey, Clerk]

JASPER C. PRESSLEY, PETITIONER

vs.

C. L. SWAIN, RESPONDENT

ORDER AUTHORIZING FILING AND DIRECTING RESPONDENT TO SHOW CAUSE

It is this 10th day of May, 1973,

ORDERED that the petition be filed without prepayment of costs.

IT IS FURTHER ORDERED that the respondent either in person or by counsel appear in the Court on or before the 5th day after service of a copy of this order and of the petition upon him and make return to said petition and show cause, if any he has why the Writ of Habeas Corpus should not issue.

IT IS FURTHER ORDERED that the respondent serve on the petitioner by mail a copy of his answer to this rule.

The Clerk is directed to furnish the United States Marshal with a copy of this order and of the petition for the purpose of making such service.

/s/ Matthew F. McGuire
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 30-73

[Filed, May 21, 1973; James F. Davey, Clerk]

JASPER C. PRESSLEY
Box 12
Lorton, Virginia 22079
PETITIONER

v.

C. L. SWAIN, Superintendent
Lorton Correctional Complex
Box 25
Lorton, Virginia 22079
RESPONDENT

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS AND RULE TO SHOW CAUSE

For answer to Petition for Writ of Habeas Corpus and rule to show cause thereon, counsel for respondent, C. L. Swain, represents to the Court that the matters complained of therein do not amount to gross incompetence on the part of petitioner's trial counsel and, accordingly, there is no basis for granting the petition.

Petitioner alleges several grounds for his contention that trial counsel was grossly incompetent. He alleges a failure to attack the validity of the search warrant but admits that the informant who provided information which served as the basis for the affidavit had helped the police recover stolen property in another case. Since the informant had proved to be reliable in the past by leading police to stolen property this would meet the test of *Jones* v. *United States*, 362 U.S. 257 (1960). In any event, the decision as to whether an attack upon the validity of the warrant would be worthwhile is subjective in nature and totally within the discretion of counsel.

Petitioner also states that there was no precise testimony as to the value of the stolen typewriter at the time

it was recovered although there was testimony as to its worth in 1969 which was $495.00. For the purposes § 22-2201, D.C. Code, 1967 ed., the exact value of the item would, in any event, be irrelevant.

Petitioner's complaints, in essence, amount to after the fact dissatisfaction with strategic and tactical decisions of trial counsel. In *Scott* v. *United States of America*, 427 F.2d 609 (D.C. Cir. 1970) the court noted that "the appropriate standard for ineffective assistance of counsel . . . is whether gross incompetence blotted out the essence of a substantial defense." Petitioner's allegations do not rise to this test and he has not met his burden of "showing requisite unfairness" of the trial as required by *Bruce* v. *United States*, 126 U.S. App. D.C. 336 (D.C. Cir., 1967). In order to prevail, petitioner must show that counsel lacked "the minimum standards of competence necessary to satisfy appellant's constitutional right to counsel." *Bruce*, supra.

Petitioner was represented at trial by counsel of his own choosing. In *Anderson* v. *Brennan*, 250 F.2d 654 (6th Circ., 1958) the petitioner complained of incompetent representation of retained counsel in that he did not object to the introducing of evidence which may have been the basis of his conviction for armed robbery. The court stated:

> "[W]e must keep in mind that appellants were represented by counsel of their own choosing . . . In the aftermath of a trial, it is often found that even the most able of counsel may have erred in some respects . . . To justify a writ of habeas corpus on the ground of incompetence of counsel, an extreme case must be disclosed, considerably more than inadequacy of representation by counsel of one's own choosing."

Finally, it should be noted that petitioner does not complain of the services rendered by his court appointed counsel on appeal. The issues raised by this petition, had they been of substance, could have been raised on appeal. After hearing oral argument, the District of Columbia Court of Appeals, No. 6063, affirmed the conviction and, according to petitioner, stated "no constitutional issues were involved." In the *Anderson* case, supra, the court stated that "habeas corpus cannot be used as a substitute for appeal for the purpose of attacking the validity of state court rulings not involving constitutional questions."

WHEREFORE, it is respectfully submitted that the Petition for Writ of Habeas Corpus should be denied and that the Rule to Show Cause thereon should be discharged.

/s/ C. Francis Murphy
C. FRANCIS MURPHY
Corporation Counsel, D.C.

/s/ John A. Earnest
JOHN A. EARNEST
Assistant Corporation Counsel, D.C.

/s/ Donald F. Rosendorf
DONALD F. ROSENDORF
Assistant Corporation Counsel, D.C.
Attorneys for the Respondent
District Building
Washington, D.C. 20004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer to Petition for Writ of Habeas Corpus and Rule to Show Cause was mailed, postage prepaid, to Jasper C. Pressley, Plaintiff pro se, Box 12, Lorton, Virginia, 22079, this 21st of May, 1973.

/s/ Donald F. Rosendorf
Assistant Corporation Counsel, D.C.
Attorney for the Respondent
District Building
Washington, D.C. 20004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus 30-73

(Superior Court Criminal Number 6733-71)

[Filed, Jun 6, 1973; James F. Davey, Clerk]

JASPER C. PRESSLEY, PETITIONER

v.

C. L. SWAIN, RESPONDENT

SUPPLEMENTAL RETURN AND ANSWER
TO RULE TO SHOW CAUSE

Comes now the respondent by his attorney, the United States Attorney for the District of Columbia, and makes the following supplemental answer to the rule to show cause:

1. By a three-count indictment filed on February 9, 1971, in the Superior Court, Criminal Number 6733-71, petitioner was charged with grand larceny (22 D.C.C. § 2201) larceny from the District of Columbia government (22 D.C.C. § 2206) and receiving stolen property (22 D.C.C. § 2205). After a trial by jury before the Honorable Tim C. Murphy on April 20, 21, and 22, 1971, petitioner was found guilty of grand larceny and larceny from the District of Columbia government and not guilty of receiving stolen property. On October 1, 1971, the court sentenced petitioner to concurrent prison terms of thirty-two to ninety-six months for grand larceny and twenty-months to five-years for larceny from the District of Columbia government. Petitioner, by counsel, appealed from his conviction. On appeal, petitioner argued principally that the variance in testimony between the government witnesses necessitated reversal. The District of Columbia Court of Appeals affirmed petitioner's conviction by order noting that the record disclosed no error

affecting the substantial rights of appellant. *Pressley* v. *United States*, Number 6063, May 22, 1972.

2. On June 5, 1972, fourteen months after his trial petitioner filed a *pro se* motion for a new trial. This motion was denied. Petitioner by counsel appealed. The issue presented on appeal was whether petitioner had been denied effective assistance of counsel because trial counsel had failed to move to suppress certain physical evidence introduced by the government. The District of Columbia Court of Appeals affirmed by order noting that trial counsel's determination not to move to suppress did not constitute professional incompetence. *Pressley* v. *United States*, Number 6631, March 2, 1973.

3. During the pendency of his appeal in that case, Number 6631, and after the affirmance of his conviction in Number 6063, petitioner filed a *pro se* motion in July of 1972 to compel production of the grand jury voting record in Superior Court Criminal Number 6733-71. On September 8, 1972, this motion was denied by the trial judge. Appointed counsel has appealed that order in the District of Columbia Court of Appeals Number 6803. The ground for the request for production of the grand-jury minutes appears to be an alleged difference in form between the signatures of the United States Attorney in Number 6733-71 and the signature on the indictment in an unrelated Superior Court Criminal case, Number 9227-71. The allegation appears to be that the alleged difference in some way taints the indictment. On March 22, 1973, the United States filed a motion for summary affirmance. The District of Columbia Court of Appeals has rendered no decision as yet.

4. Petitioner styles his present pleading a writ of habeas corpus. However, he indicates that the principal claim for relief is based on ineffective assistance of counsel. He also alludes to a further complaint that the evidence at trial was either not credible or insufficient. These two points appear to be substantially identical to those previously raised on appeal as outlined above. Petitioner also alleges that the indictment by which he was charged was defective. This issue is substantially identical to the one presently before the District of Columbia Court of Appeals in Number 6803.

5. This court lacks jurisdiction to entertain this petition. A collateral attack upon a conviction in the Superior Court may be brought only by a motion pursuant to 23 D.C.C. § 110 in the Superior Court; subsection (g) thereof expressly provides that a writ of habeas corpus shall not be entertained by the Superior Court or by any Federal or State Court if it appears that the applicant has failed to make a motion for relief to the sentencing court unless it appears that the remedy under § 110 is inadequate or ineffective. No reason appears why such motion would be inadequate or ineffective.

WHEREFORE, the respondent respectfully requests that the rule to show cause be discharged and that the petition be denied on the ground that this court lacks jurisdiction over this matter.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ Earl J. Silbert
EARL J. SILBERT
Principal Assistant U.S. Attorney

/s/ Oscar Altshuler
OSCAR ALTSHULER
Assistant United States Attorney

/s/ Tobey W. Kaczensky
TOBEY W. KACZENSKY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing supplemental return and answer to rule to show cause has been mailed to Glenn L. Archer, Jr. 888 17th Street, N.W., Washington, D.C. 20006, this 6 day of June, 1973.

/s/ Tobey W. Kaczensky
TOBEY W. KACZENSKY
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus 30-73

[Filed Jul. 9, 1973, James F. Davey, Clerk]

JASPER C. PRESSLEY, PETITIONER

v.

C. L. SWAIN, RESPONDENT

REPLY OF PETITIONER

Petitioner, Jasper C. Pressley, by his court-appointed attorney, respectfully submits the following reply to respondent's (1) answer and (2) supplemental return and answer.

THIS COURT HAS JURISDICTION TO ENTERTAIN THIS PETITION FOR HABEAS CORPUS IN ACCORDANCE WITH TITLE 28, U.S.C. § 2241

Petitioner Has Complied With The Terms Of 23 D.C. Code § 110.

23 D.C.C. § 110 requires application for relief by motion to the sentencing court, in this case the Superior Court, before applying for a writ of habeas corpus. Petitioner filed such a motion when, on June 5, 1972, he filed a pro se motion for a new trial, raising the following questions: legality of the search and seizure, validity of the indictment, jurisdiction of the court, legality of his custody, and effectiveness of counsel. Judge Murphy denied the motion. Petitioner by counsel appealed. The issue on appeal was whether the assistance of counsel had been effective. The Court of Appeals affirmed. These procedural steps satisfy the requirements of 23 D.C.C. § 110, and the application for a

writ of habeas corpus is properly before the District Court.

Petitioner's Rights Should Not Be Denied Through Resort To Technicalities.

Although the petitioner filed a motion for a new trial rather than a motion to vacate, set aside, or correct the sentence as required by 23 D.C.C. § 110, such a technicality should not interfere with the petitioner's constitutional right to apply for a writ of habeas corpus. Petitioner's motion was filed pro se, and he could not be expected to be aware of the procedural prerequisites for application for habeas corpus and to fashion his motion before the Superior Court accordingly. The importance of a prisoner's access to the writ should override the significance of any distinction between a motion for new trial and the forms of collateral attack specified in 23 D.C.C. § 110.

In *Woods* v. *Rodgers*, 275 F. Supp. 559 (D.C. D.C. 1967), a hearing on a return to a writ of habeas corpus, the question was whether the District Court had jurisdiction or whether petitioner's remedy was by motion under 28 U.S.C. § 2255, a statute similar to 23 D.C.C. § 110. Judge Holtzoff stated:

> The Court is unable to perceive why the petitioner is proceeding by means of a petition for writ of habeas corpus instead of by motion under 28 U.S.C. § 2255 to set aside the sentence. The Court will, however, consider the present proceeding as though it was a motion under 28 U.S.C. § 2255, as well as a petition for writ of habeas corpus, because these technical refinements should not control the disposition of the petitioner's right. (id at 560)

See also *St. Clair* v. *Hyatt*, 83 F. Supp. 585 (D.C. Ga. 1949), where the judge treated petitioner's letter to him relating to the validity of the sentences as a motion under 28 U.S.C. § 2255.

In sum, therefore, petitioner's motion for a new trial satisfies the statutory requirements of 23 D.C.C. § 110,

and the grounds of petitioner's application should be considered on the merits by the District Court.

PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS AND HIS RIGHT TO EFFECTIVE COUNSEL AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION AS A RESULT OF AN AGGREGATION OF ERRORS COMMITTED BY HIS TRIAL COUNSEL

Petitioner's Trial Counsel Failed To Move For A Suppression Of Illegally Seized Evidence.

Petitioner was charged with and ultimately convicted of the crime of stealing a typewriter, the property of the District of Columbia. The sole basis for the indictment charging petitioner with this offense was the seizure pursuant to a search warrant by the Metropolitan Police from a house leased by petitioner.

The sole basis, in turn, for the issuance of the search warrant was information given to the Metropolitan Police by Roman C. Dixon contemporaneous with his arrest for grand larceny. According to the affidavit in support of the search warrant (Exhibit A) Dixon told the Metropolitan Police that on January 20, 1971, he had seen a bluish green IBM Selectric typewriter in the basement recreation room of petitioner's residence at 6809 Ninth Street, N.W., Washington, D.C. Further, according to the affidavit, a light green IBM Selectric typewriter serial #6238665 had been reported stolen on or about November 13 and 14, 1970, from the Pilot District Project, a community relations project sponsored by the District of Columbia, where both petitioner and Dixon were employed.

Based on this search warrant issued February 1, 1971, the Metropolitan Police on that same date searched petitioner's residence. Pursuant to that search, the Metropolitan Police discovered an IBM Selectric typewriter, serial #5613255, contained within a storage area

in petitioner's basement recreation room (Tr. 106).* As of the time of the seizure, petitioner stated he had no knowledge as to the existence of that typewriter or how it came to be placed in the crawl space (Tr. 111).

It was subsequently learned that an IBM typewriter, serial #5613255, had in fact been the typewriter reported missing on or about November 14, 1970, from the Pilot District Project, and that the IBM typewriter, serial #6238665, was not missing but was still on the premises of the Pilot District Project (Tr. 18-19).

As of petitioner's trial on April 20-22, 1971, certain facts were known which bore heavily on the reliability of the information supplied by Dixon to the Metropolitan Police. In November of 1971, both petitioner and Dixon lived in a house rented by petitioner at 1530 Spring Place, N.W., Washington, D.C. (Tr. 262-263). On about November 27, 1970, petitioner moved from this residence to 6809 Ninth Street, N.W., Washington, D.C. (Tr. 247, 310). Thereafter, on about January 20, 1971, in a combined move, petitioner moved his remaining furnishings and possessions from 1530 Spring Place to his residence at 6809 Ninth Street and Dixon moved from 1530 Spring Place, N.W. to 1410 Missouri Avenue, N.W. (Tr. 134, 138, 324-326). During the course of this move, Udolph R. Porter, who aided petitioner and Dixon in this combined move, saw Dixon place a green electric typewriter in the storage area, or crawl space, in petitioner's basement recreation room at 6809 Ninth Street (Tr. 137).

Earlier on the day of the move, Porter had seen the same typewriter in a closet in the basement apartment occupied by Dixon at the Spring Place residence (Tr. 146), and had seen Dixon carry the same typewriter from the rental truck that was being used in the move to the basement recreation room of petitioner's residence on Ninth Street (Tr. 137, 146, 150). Another person who aided petitioner and Dixon in the move, Rudolph Tate, saw Dixon adjusting the panel which had to be removed in order to gain access to the crawl space (Tr. 200).

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* "Tr." references are to the trial transcript.

Based on these facts, there was clearly sufficient grounds to move for a suppression from evidence of the seized IBM Selectric typewriter, serial #5613255. Such a suppression would have resulted in a dismissal of the charges against petitioner.

Petitioner's Trial Counsel Failed To Challenge The Propriety Of The Grand Jury Indictments Returned Against Petitioner.

In the course of the proceedings against petitioner, two separate indictments were returned against petitioner, the first one (Exhibit B) charging petitioner with theft of the above-described IBM typewriter, and the second (Exhibit C) charging petitioner with assault. On the face of these two indictments, the signature of the then United States Attorney, Thomas A. Flannery, appears materially different. This discrepancy in signatures clearly rebutts the presumption of regularity in these indictments as set forth in *Gaither* v. *United States*, 134 U.S. App. D.C. 154, 163-164 (1969), a point that was not raised by petitioner's trial counsel. Had these indictments proved to have been improper, the charges against petitioner would have been dismissed.

Petitioner's Trial Counsel Failed To Move For A Judgment Of Acquittal, On The Grounds That One Of The Government's Principal Witnesses, Roman C. Dixon, Apparently Committed Perjury.

During the course of the trial, there appeared substantial reason to believe that one of the government's principal witnesses, Roman C. Dixon, committed perjury.

In describing the typewriter seized from petitioner's residence, Lieutenant Keahon of the Metropolitan Police noted (Tr. 107-108) two separate sets of disclorations on the typewriter. One set of discolorations was white "sticky stuff" described as either paint or "some type of plaster". The other set of discolorations described by Lieutenant Keahon as bronze in color was identified as fingerprint dusting powder, which powder was put on the typewriter in the Metropolitan Police Department Crime

Lab after it had been removed from petitioner's residence.

In identifying the typewriter that he had seen in petitioner's residence, Dixon testified (Tr. 72) that he remembered seeing "white marks on it like somebody had been painting on top of it" and in addition some "spray paint, like they would use some kind of silver paint to spray in their hair". Apparently, Dixon was referring to the substance which was subsequently identified as fingerprint dusting powder, a substance which Dixon could not possibly have seen on the typewriter prior to its seizure from petitioner's residence. This discrepancy, coupled with the testimony of Udolph Porter (Tr. 146) that he had seen Dixon place the typewriter in the crawl space in petitioner's basement, strongly suggests the possibility that Dixon committed perjury, a possibility that was apparently never explored by petitioner's trial counsel. Had it been established that Dixon, a principal witness in the government's case against petitioner, had committed perjury, petitioner would have at the very least been granted a mistrial, if not had the charges against him dismissed.

Petitioner's Trial Counsel Failed To Object During Trial To The Introduction Into Evidence Of The Typewriter.

In addition to failing to move, preliminary to trial, to suppress from evidence the illegally seized typewriter, petitioner's trial counsel also failed during the course of the trial to object to the introduction of the typewriter into evidence. At the very least, in effort to preserve record for appeal, petitioner's trial counsel should have objected to the introduction into evidence of the typewriter. There was substantial reason to believe that the typewriter had been placed in petitioner's basement by Dixon, which, if true, would have resulted in a dismissal in the charges against petitioner. The failure of petitioner's trial counsel to either challenge Dixon's testimony or the introduction into evidence of the typewriter clearly deprived petitioner of a substantial defense.

SUMMARY OF ARGUMENT

The cumulative effect of the above-enumerated factors, (1) the failure to move for a suppression of illegally seized evidence, (2) the failure to challenge the propriety of the grand jury indictments, (3) the failure to move for a judgment of acquittal on the grounds of perjury of a government witness, and (4) the failure to object to the introduction into evidence of the typewriter, any one of which factors if successfully advanced would have resulted in a dismissal of the charges against petitioner, clearly resulted in a denial of petitioner's right to due process and right to effective counsel. Accordingly, it is respectfully submitted that there are sufficient grounds to warrant the issuance of a writ of habeas corpus in favor of petitioner.

/s/ Glenn L. Archer, Jr.
GLENN L. ARCHER, JR.
888 17th Street, N.W.
Washington, D.C. 20006

Appointed Counsel for
Petitioner

Of Counsel

Michael C. Durney
HAMEL, PARK, MCCABE & SAUNDERS
888 17th Street, N.W.
Washington, D.C. 20006

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Reply of Petitioner has this 9th day of July, 1973, been made on counsel by hand delivering a copy thereof to:

TOBEY W. KACZENSKY
Assistant United States Attorney
United States Courthouse
Washington, D.C. 20001

/s/ Michael C. Durney
MICHAEL C. DURNEY
HAMEL, PARK, MCCABE & SAUNDERS
888 17th Street, N.W.
Washington, D.C. 20006

EXHIBIT A

[Filed Jul[illegible], 1973, James F. Davey, Clerk]

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
Criminal Division

SEARCH WARRANT

TO: P1.C Richard A. Hayden, Third District, Member of Metropolitan Police Department authorized to serve same.

Affidavit having been made before me by P1.C Richard A. Hayden, Third District (affidavit attached herewith) that he (has reason to believe) that (on the premises known as): For the entire premises of 6809 9th St., Washington, D.C. in the District of Columbia, there is now being concealed certain property, namely: Two MPDC Badges and IBM Electric Typewriter which are Title 22 Section 2205 D.C. Code (alleged grounds for seizure) and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

YOU ARE HEREBY COMMANDED TO SEARCH FORTHWITH the (place) named for the property specified, serving this warrant and making the search (in the daytime) and if the property be found there, to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized. Return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 1 day of Feb., 1971.

/s/ [Illegible]
Judge, Superior Court of
the District of Columbia

RETURN

I received the search warrant, detailed above February 1, 1971 and have executed it as follows:

On February 1, 1971 at 1430 o'clock 1430 Hr's. M. I searched the (premises) described in the warrant and I left a copy of the warrant with: Jasper Pressley (Name of person searched or owner of place of search) together with a receipt for the items seized.

The following is an inventory of property taken pursuant to this warrant:

#1 IBM Electric Typewriter Serial #5613255

This inventory was made in the presence of Jasper Pressley.

I swear that this inventory is a true and detailed account of all the property taken by me on this warrant.

/s/ P1C. Richard A. Hayden
MPDC

SUBSCRIBED AND SWORN TO BEFORE ME THIS —— DAY OF ————————, 19—.

————————
Judge, Superior Court of
the District of Columbia

[1] The Federal Rules of Criminal Procedure: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C).

AFFIDAVIT IN SUPPORT OF A DISTRICT OF COLUMBIA SUPERIOR COURT SEARCH WARRANT FOR ENTIRE PREMISES OF 6809 9th STREET, NORTHWEST, WASHINGTON, D.C. A ONE STORY BRICK RAMBLER TYPE DWELLING OCCUPIED BY JASPER LEE PRESSLEY.

CHARGE: RECEIVING STOLEN PROPERTY IN VIOLATION OF THE DISTRICT OF COLUMBIA CODE, TITLE 22, SECTION 2205

Roman S. Dixon, male, 21 years of age, 1410 Missouri Avenue, Northwest, Washington, D.C. was arrested at 1:30 P.M., Thursday, January 27, 1971 at 1624 V Street, Northwest, Washington, D.C. (Third District Headquarters). The defendant (Dixon) was charged with Grand Larceny on arrest warrant #USW 536-71 (District of Columbia Court of General Sessions Warrant).

The defendant (Dixon) admitted his part in this offense to the undersigned officer at the time of his arrest. He also admitted using a Metropolitan Police Officer's Badge #2591 during the commission of this offence. He further admitted stealing the badge #2591, from a police officer coat which was in the report writing room of the Third District Headquarters building.

The defendant (Dixon) assisted the arresting officer's in recovering all of the property that was taken in the Grand Larceny offense. As a result of the reliability and truthfulness of this defendant eight ladies rings with an approximate value of Twenty-three Hundred Dollars ($2,300.00) was recovered from several different persons and locations within the District of Columbia. The Metropolitan Police Department Badge #2591 was also recovered.

This defendant (Dixon) also related that on several different occasions, the latest being Thursday evening, January 20, 1971 that he saw two other Metropolitan Police Department Badges: one a Sergeant's badge, gold in color and the other an officer's badge, silver in color. He stated that he saw the badges in the bedroom, first floor of 6809 9th Street, Northwest, Washington, D.C.

He continued and related that the occupant of these premises, Jasper Lee Pressley showed him the badges, while in Jasper Lee Pressley's home, the defendant (Dixon) stated that he saw two typewriters. One, he was in the basement recreation room an IBM Electric, bluish green in color. The second typewriter was on the first floor of the same premises. The defendant (Dixon) continued and stated that Pressley and one Allen Colston both told him that the typewriters came from the office of the Pilot District Project.

The defendant (Dixon) and both Jasper Lee Pressley and Allen Colston all are employees of the Pilot District Project. The project is a Police Community Relations experimental program involving officers of the Third District and community residents of the District of Columbia. As a result of their employment, all three have access to certain areas within the Third District Headquarters and sub-station buildings and the offices of the Pilot District Project, 2101 16th Street, Northwest, Washington, D.C.

During the past year the employees of the Pilot District Project have reported a variety of articles stolen from the offices located at 2101 16th Street, Northwest, Washington, D.C. The latest articles reported stolen was one (1) selective IBM light green typewriter Serial #6238665, Friday, November 13, 1970 and Saturday, November 14, 1970 between the hours of 7:30 P.M. and 11:00 A.M. Complaint #587-947.

A check of the reports at the Third District shows that in complaint number 19634 that Sergeant Charles F. Klopfer, Third District reported his Sergeant's badge #S99 missing sometime between 4:00 P.M., on January 13, 1970 and 2:30 P.M. on January 14, 1970 somewhere in the vicinity of his home and the Third District Substation.

Also, under Complainant number 533-373 Officer Hugh F. Triggs, Third District reported that about 3:30 P.M. on October 17, 1970 his badge #2608 was stolen from his locker, from the basement of Third District Headquarters.

In view of the foregoing, the undersigned has probable cause to believe that the above described stolen property is presently located in the premise 6809 9th Street, Northwest, Washington, D.C. and therefore requests that a District of Columbia Superior Search Warrant issue authorizing the seizure of said property which is the Proceeds of a Crime.

/s/ Richard A. Hayden
RICARD A. HAYDEN
Plainclothesman,
Third District,
Metropolitan Police
Department

Subscribed and sworn to before me this Feb. 1, 1971.

/s/ [Illegible]
Judge,
D.C. Superior Court

EXHIBIT B

[Filed Jul. 9, 1973, James F. Davey, Clerk]

OF THE
DISTRICT OF COLUMBIA

Holding a Criminal Term
Grand Jury Sworn in on February 1, 1971

Criminal No.

THE UNITED STATES OF AMERICA

v.

JASPER C. PRESSLEY

Violation: 22 D.C. Code 2201, 2206, 2205

(Grand Larceny; Larceny from the District of Columbia; Receiving Stolen Property)

The Grand Jury charges:

FIRST COUNT:

On or about November 13, 1970, within the District of Columbia, Jasper C. Pressley stole property of the Pilot District Project, an agency of the District of Columbia Government, of the value of about $495.00, consisting of one typewriter of the value of $495.00.

SECOND COUNT:

On or about November 13, 1970, within the District of Columbia, Jasper C. Pressley did steal the said property of the District of Columbia, a Municipal Corporation, having a value of $495.00, consisting of one typewriter of the value of $495.00.

THIRD COUNT:

On or about November 13, 1970, within the District of Columbia, Jasper C. Pressley with intent to defraud, received one typewriter, property of the District of Columbia Government, which had been stolen knowing and having cause to believe the said property had been stolen.

/s/ Thomas A. Flannery
Attorney for the United
States in and for the District
of Columbia

A True Bill:

/s/ [Illegible]
Foreman
Notary Public

EXHIBIT C

[Filed Jul. 9, 1973, James F. Davey, Clerk]

SUPERIOR COURT
OF THE
DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on February 1, 1971

Criminal No. 9227-71

THE UNITED STATES OF AMERICA

v.

JASPER C. PRESSLEY, RUDOLPH PORTER, BETTY J. SMITH

Violation: 22 D.C. Code 502

(Assault With a Dangerous Weapon)

The Grand Jury Charges:

On or about February 5, 1971, within the District of Columbia, Jasper C. Pressley, Rudolph Porter and Betty J. Smith assaulted Roman S. Dixon with dangerous weapons, that is, a pistol and a screwdriver.

/s/ Thomas A. Flannery
Attorney of the United
States in and for the District
of Columbia

A TRUE BILL:

/s/ [Illegible]
Foreman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Jul. 12, 1973, James F. Davey, Clerk]

Habeas Corpus Number 30-73

JASPER C. PRESSLEY, PETITIONER

v.

C. L. SWAIN, RESPONDENT

ANSWER TO THE REPLY OF PETITIONER

Comes now the respondent by his attorney, the United States Attorney for the District of Columbia, and makes the following answer to the *Reply of Petitioner* filed by his court-appointed counsel.

1. The background of this case is set out in respondent's Supplemental Return and Answer to Rule To Show Cause filed on June 6, 1973. That pleading was filed in response to petitioner's *pro se* motion filed on May 23, 1973. *Reply of Petitioner* was filed on July 9, 1973 by his court appointed counsel.

2. With respect to the issue of whether the United States District Court for the District of Columbia has jurisdiction to entertain a collateral attack on a judgment of the Superior Court by habeas corpus or otherwise, petitioner's position appears to be that once a person convicted in the Superior Court applies for vacation of his conviction to the sentencing court, is rejected, and thereafter loses on appeal, he may apply to the United States District Court for a writ and relitigate the same issues there. The law with respect to federal habeas corpus is otherwise. As a general rule, the right to a writ of habeas corpus in the federal system accrues only where there is no remedy available in a local court and not because the petitioner has failed to prevail in the local court. Furthermore, Congress, in the District of Columbia Court Reorganization Act of 1970, has

vested exclusive post-conviction collateral review of Superior Court convictions in the sentencing court.

3. In another recent habeas corpus matter in this court, the same jurisdictional issue was raised. *Palmore* v. *Superior Court, et al.*, Habeas Corpus Number 31-73. Attached hereto is the memorandum of law filed by the United States in that case which the government submits here in support of its position with respect to jurisdiction.

4. As to the merits of his claims, petitioner's contention that he was denied effective assistance of counsel at trial since counsel failed to move to suppress or otherwise object to the admission of a typewriter into evidence was heard by the District of Columbia Court of Appeals and his conviction was affirmed. Number 6631, decided March 2, 1973.

Likewise, petitioner's allegation that a principal government witness, Roman C. Dixon, committed perjury was the subject of another appeal to the District of Columbia Court of Appeals and petitioner's conviction was affirmed. Number 6063, decided May 22, 1972.

Again petitioner's third point, an allegation of the impropriety in the indictment charging petitioner was the subject of yet another appeal in the District of Columbia Court of Appeals. Petitioner's conviction was upheld. Number 6803, decided July 6, 1973.

WHEREFORE, it is respectfully submitted that the rule to show cause be discharged and that the petition be dismissed.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ Earl J. Silbert
EARL J. SILBERT
Principal Assistant U.S. Attorney

/s/ Oscar Altshuler
OSCAR ALTSHULER
Assistant United States Attorney

/s/ Tobey W. Kaczensky
TOBEY W. KACZENSKY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing answer to the reply of petitioner has been delivered to appointed counsel for petitioner, Glenn L. Archer, Jr., 888 17th Street, N.W., Washington, D.C. 20006, this 12th day of July, 1973.

/s/ Tobey W. Kaczensky
TOBEY W. KACZENSKY
Assistant United States Attorney

• • • •

[The Petitioners' *Memorandum of Law* to their *Return and Answer to Order to Show Cause* filed in the *Palmore* case on June 4, 1973, which was appended to this *Answer and Reply* filed by Petitioner Swain, is included on pages 29-42 of this Appendix and therefore has been omitted here.]

[Transcript of Hearing on Writ of Habeas Corpus]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 30-73

[Filed Feb. 3, 1975, James F. Davey, Clerk]

JASPER C. PRESSLEY, PETITIONER

v.

C. L. SWAIN, RESPONDENT

Washington, D.C.
July 16, 1973

The above-entitled cause came on for Hearing on Writ of Habeas Corpus before the HONORABLE GERHARD A. GESELL, United States District Judge, at 9:30 a.m.

APPEARANCES:

GLENN L. ARCHER, Jr., Esq.,
MICHAEL C. DURNEY, Esq.,
Counsel for Petitioner

TOBEY W. KACZENSKY,
Assistant United States Attorney,
Counsel for Respondent

IDA Z. WATSON
Official Reporter
U.S. Court House
Washington, D.C.

COPY FOR:

COURT FILE

[3] PROCEEDINGS

THE CLERK: Habeas Corpus No 30-73, Jasper C. Pressley v. C. L. Swain. Mr. Glenn L. Archer and Mr. Tobey Kaczensky.

THE COURT: All right, I will hear from the Petitioner.

MR. ARCHER: May it please the Court, my name is Glenn Archer, Jr., and my associate is Michael C. Durney.

The case of Jasper C. Pressley here before the Court arose on a petition for the issuance of a writ of habeas corpus which was filed by the Petitioner pro se on May 11, 1975 in forma pauperis.

Following the Government's answer that was filed on May 21, 1973, Judge McGuire ordered the writ to issue and appointed me as counsel to represent the Petitioner.

The other pleadings in this case are the Government's supplemental answer, filed on June 6, 1973, the Petitioner's reply filed on July 9, 1973, and the Government's answer to Petitioner's reply filed on July 12.

To provide just a little background on this case, the Petitioner's house at 6809 Ninth Street, Northwest was searched on February 1, 1971 under a search warrant.

THE COURT: I have read the file. I am fully familiar with the case.

MR. ARCHER: Yes, Your Honor.

THE COURT: What is the preliminary matter you want [4] to bring up?

MR. ARCHER: There are two issues raised by the pleadings. In the Government's supplemental answer filed on June 6 there was a question raised of this Court's jurisdiction to hear a writ of habeas corpus in view of 23 District of Columbia Code.

THE COURT: 110.

MR. ARCHER: 110(g). The Government stated: A writ of habeas corpus shall not be entertained by any Federal Court if it appears that the applicant has failed to make a motion for relief to the sentencing Court.

Petitioner's reply pointed out that a petition had been filed pro se for a motion for new trial and we con-

tended that this should be construed as a motion to correct sentence and that the Petitioner should not be denied access to a writ of habeas corpus on a mere procedural technicality.

In the Government's answer to Petitioner's reply, filed on July 12, for the first time I think the Government brought out its principal contention here, by stating that the Section 110(g) of the D.C. Code vested exclusive post-conviction collateral review of Superior Court convictions in the sentencing Court.

The Government attached a memorandum of law which has been filed in the case of Roosevelt Palmore, Habeas Corpus 31-73, in this Court.

[5] We have obtained the Petitioner's brief in that case and we fully subscribe to the arguments that are presented therein, namely, that the Supreme Court—

THE COURT: I haven't seen the brief in that case filed by the Petitioner. I have seen the Government's brief, which accompanied its papers.

MR. ARCHER: Yes, I have with me this morning—

THE COURT: You are talking about Palmore?

MR. ARCHER: Yes. I have with me this morning the two Petitioner's briefs and I would like to submit them.

THE COURT: All right, hand them up.

MR. ARCHER: Incidentally, there is one page on that, Your Honor, that is not too legible and we would like to try to obtain a more legible copy for you and submit it to you, if we may. I think, also, maybe one line got cut off at the top of one of the pages, too.

THE COURT: I can read it.

You mean you want me to rely on the Advisory Committee Rules?

MR. ARCHER: No, there are two briefs.

THE COURT: The Advisory Committee Rules are not applicable. The Court is a member of the Advisory Committee and these rules are not designed to cover the District of Columbia situation.

MR. ARCHER: Sir, there is another brief. The one [6] on the Advisory Committee was filed as a supplement to the Petitioner's main brief there. We are really

relying on the arguments and the authorities in the main brief of Petitioner.

THE COURT: All right.

Do you want to proceed with your argument?

MR. ARCHER: Yes, sir. That is what we have on the jurisdictional point that was raised by the Government.

As to the merits of the petition for issuance of a writ of habeas corpus, the Petitioner's pro se petition is based on a series of alleged failures on the part of his trial counsel to act, which it is contended either separately or in the aggregate blotted out the essence of a substantial defense.

THE COURT: Wasn't that heard up through the Superior Court system?

MR. ARCHER: It was heard as to the failure to suppress evidence, Your Honor; and the argument was made that he had ineffective assistance of counsel for failure to suppress.

We have—

THE COURT: What other deficiencies do you find?

MR. ARCHER: There are two things we would like to point out in that connection: One, we do allege that there were other errors of trial counsel; and, secondly, we believe that the District of Columbia Court of Appeals applied an erroneous test in deciding the case on ineffective assistance of counsel.

[7] In their decision they said that the failure to suppress did not amount to professional incompetence. We believe that under the Bruce decision that the test is whether a substantial defense has been blotted out; and we believe that the criteria of the District of Columbia Court of Appeals is much more strict than what is required by the Bruce decision.

THE COURT: Well, as far as the other claims of inadequate assistance of counsel are concerned, shouldn't they first be ventilated through the Superior Court system before it comes over here? Assuming I have jurisdiction.

MR. ARCHER: Sir, I believe it has gone through—there was a motion for new trial and then on the appeal,

when that motion was denied, the question before the Court was whether there was ineffective assistance of counsel.

THE COURT: I don't have any record in front of me, do I? I don't have any record at all in front of me. I don't have the trial record in front of me. It is not in these papers. I don't know what the transcript shows.

I don't understand how it is contemplated that I could examine the issue.

MR. ARCHER: We can file, Your Honor, the transcript in the lower Court and the record on appeal.

THE COURT: I don't see any of those materials. If I had jurisdiction, I would have to see what happened at the trial. I don't have anything in front of me.

[8] Let me hear you on the jurisdictional point. Where do you think I get jurisdiction?

MR. ARCHER: Well, on the jurisdictional point, we believe that the—

Excuse me, just a minute. May I get a copy of that?

THE COURT: Yes. What is it that gives me jurisdiction?

MR. ARCHER: On the jurisdiction, the Solicitor General argued in the Palmore case, which is the earlier case to the one that this brief was filed in, when it went up to the Supreme Court, that the Court Reorganization Act of 1970 for this District of Columbia jurisdiction was the same as or the equivalent of a state statute.

Of course, in all states there is a right to file for a petitioner writ of habeas corpus to Federal District Court. According to the procedures that have been set up that have been satisfied—

THE COURT: His argument hasn't any significance. What the Solicitor General says up in the Supreme Court hasn't any significance. It is a question of what the statute says, isn't it?

MR. ARCHER: Well, we believe there is a constitutional question involved, if the statute is to be construed as the Government says it is construed. The reason for this is that the right to a writ of habeas corpus, we believe, under the [9] Supreme Court decisions, must

be available in a constitutional Article III Court, where the judges have tenure; and that the constitutional requirement in so far as the writ is concerned cannot be satisfied when your last resort is in an Article I Court, as the Superior Court and the D. C. Court of Appeals are.

These same arguments are presented in the Palmore case which is presently before Judge Waddy of this Court.

THE COURT: Has that been argued to him?

MR. ARCHER: I don't know, sir, whether it has been argued. The last brief was filed on June 21, 1973. Petitioner's supplemental memorandum, and I don't know whether it has been argued yet or not. Perhaps the Government attorney would know that.

MR. KACZENSKY: That case has been argued and presently waiting for Judge Waddy to render an opinion on that.

THE COURT: That means you would have us retry all cases tried in the Superior Court.

MR. ARCHER: I don't believe that is correct.

THE COURT: Isn't that what it means? It would mean that every Lorton—

MR. ARCHER: If there is a constitutional issue involved.

THE COURT: Well, every Lorton prisoner would claim that he didn't have adequate counsel; so we would take each case [10] and review whether he had adequate counsel.

Isn't that the practical effect of what you are suggesting?

MR. ARCHER: It could very well be the practical effect of it, Your Honor, but I believe from a constitutional—

THE COURT: Do we have enough judges here to do that, do you think?

MR. ARCHER: I don't know that.

THE COURT: They are running 16,000 cases a year.

MR. ARCHER: I don't know what the answer is to that, Your Honor, but the constitutional question in-

volved, I think, is indicated by the Supreme Court cases where there is at least—

THE COURT: They have a direct review to the Supreme Court, do they not, from Judge Reilly's Court?

MR. ARCHER: Yes, they do.

THE COURT: It is not a certiorari review, is it?

MR. ARCHER: You mean from the D.C. Court of Appeals?

THE COURT: Yes.

MR. ARCHER: I am not certain on that, whether it is certiorari or a direct appeal.

THE COURT: I don't have any facts in this petition which—if I did have jurisdiction—would warrant me to grant the writ. Apart from that, you want a determination as to whether or not this Court has jurisdiction.

[11] Perhaps the way to proceed is for me to hear the Government on that issue and decide it one way or the other; and then if I decide I have jurisdiction, give you the opportunity to—

MR. ARCHER: To file with the Court the trial record.

THE COURT: —file the record, so I could determine the underlying issue. But if I don't have jurisdiction, there is no point in doing that.

MR. ARCHER: That is correct.

THE COURT: You simply say that regardless of what the statutes may or may not provide, that the Constitution provides that the writ shall be available and that it is available only in a constitutional court; and that if the Act contemplated taking it away in this particular instance, that that, in itself, is an unconstitutional provision.

MR. ARCHER: That is correct. And there is still a provision in the United States Code which permits writs of habeas corpus to District Court from a state jurisdiction. And, of course, the Supreme Court, in the earlier Palmore case, did adopt the Solicitor General's argument that the Reorganization Act in the District of Columbia was the equivalent of a state court system.

THE COURT: I think I have your position. Thank you, Mr. Archer.

MR ARCHER: If I could take one more minute, [12] Your Honor. We have pointed out in our reply two other alleged failures on the part of the trial counsel, in addition to the motion to suppress. One is a potential faulty indictment; and the other is potentially perjured testimony of the principal Government witness who we believe was essential to any conviction.

We believe that these are something more than just bad trial tactics or improvident actions on the part of the trial attorney in not raising these issues before the trial court; and we believe that had any one of them be successful before the trial court, they would have changed the outcome of the trial.

THE COURT: Well, those you haven't raised in the other Court, right?

MR. ARCHER: Well, they have been raised in other proceedings. The question of perjured testimony—

THE COURT: Was that reviewed on appeal in the other Court?

MR. ARCHER: Yes.

THE COURT: What did they hold?

MR. ARCHER: Excuse me just a moment.

THE COURT: What did they hold?

MR. ARCHER: Well, in each case there was just affirmance of the lower court per curiam without any real discussion of these issues.

[13] THE COURT: You have the motion to suppress, the perjury; and what was the third?

MR. ARCHER: And the potential faulty indictment.

THE COURT: What is the potential faulty indictment?

MR. ARCHER: There was another indictment issued the same day as the one that was involved in Mr. Pressley's case against Mr. Pressley; and on the face of the indictment the signature of the then United States Attorney, Mr. Flannery, is materially different and there is no indication that there was any authority—that it was signed by anyone else in authority; and we believe that a question should have been raised at the trial as to whether the indictment were proper

in view of the obvious difference in the sigatures of the United States Attorney.

THE COURT: Who was the trial counsel?

MR. ARCHER: Mr. Fink, Mr. Jules Fink.

THE COURT: All right, I have the three points.

MR. ARCHER: All right, thank you very much.

MR. KACZENSKY: Good morning, Your Honor. My name is Tobey Kaczensky, representing the United States in this matter and particularly representing Mr. C. L. Swain, who is the Superintendent of the Lorton Reformatory, who is a D.C. official.

As Your Honor may understand, our position is that the jurisdictional matter in this case and all others is critical [14] because if what Mr. Archer for Mr. Pressley suggests is true, instead of a more efficient Court system, a less encumbered system, we will have a far more complex system than we had before the Court Reorganization Act.

THE COURT: If we don't already have it.

MR. KACZENSKY: If we don't already have it.

Our suggestion is that the purpose was to eliminate a double appeal in the Court Reorganization Act. As Your Honor well knows, an appeal to the District Court of Appeals—

THE COURT: What about the constitutional point?

MR. KACZENSKY: The Constitution says that Congress shall not suspend the writ of habeas corpus. They have not suspended the writ of habeas corpus. They have made specific provision for it.

THE COURT: Don't you think denying it might be suspending it?

MR. KACZENSKY: Mr. Pressley, or anybody situated like him, is not denied a writ of habeas corpus. He has the D.C. Code which permits him to file over there. The question is, of course, whether the Superior Court and the D.C. Court of Appeals are constitutional courts.

With respect to that, in the first place, they have been set up by Congress; and as our pleadings further elucidate, there is nothing in the Constitution which indicates that Congress need set up any courts under

Article III. The question [15] is, if they didn't and had no other court set up, how would they provide for writ of habeas corpus.

THE COURT: Is Superior Court entertaining writs of habeas corpus?

MR. KACZENSKY: Indeed they are. Mr. Altshuler, who has been in business, so-called, for years, has had a number of writs directed at both Federal and D.C. officials and any sort of a problem, as Your Honor knows, may arise and are being entertained over there by the judges and relief or dismissal or whatever is appropriate is being issued in that court with the right of appeal. Our office is responding to the appeal or the Corporation Counsel.

THE COURT: So you would say the writ isn't suspended and that the statutory scheme was designed to keep the writ there and out of here?

MR. KACZENSKY: Indeed, and Congress has specifically provided in the D.C. Code for the opportunity to amend, to pursue the writ of habeas corpus, to question the legality of this custody.

In addition to that, it has, much like it did in 18 U.S. Code 2255, specifically provided in 23 D.C. Code 110 for a remedy which can raise collateral issues.

As Your Honor undoubtedly knows, many habeas corpuses filed in Federal Court were filed because the state courts lacked provision for a remedy. One of them, a glaring example, [16] was the effectiveness of counsel question. Many state courts—I think it has been improved over the years.

THE COURT: That remedy is available over in the Superior Court.

MR. KACZENSKY: Yes, it is. In short, Mr. Pressley has no difficulty in having his rights asserted and having his entire conviction reviewed on any point which is available in the United States Federal Court and he has a perfect right to go to the Supreme Court and have a final review of those issues. Congress has provided for that. They haven't suspended any constitutional right I am aware of, including specifically the right of habeas corpus.

As we argue in our memorandum, which will be the position we intended to take consistently before this Court, the Court Reorganization Act has the very sensible provision to divide jurisdiction between the two courts set up under the Constitution, Superior Court under Article I, District Court under Article III. Congress has provided for an efficient, fair system for the District of Columbia, very assiduously kept in mind all these problems that this Court and all other Federal Courts have become aware of over the years and provided for a reasonable and efficient court system to hear any and all claims.

Indeed, Mr. Pressley, as an example, has been treated, I would submit, as fairly as one could be. He has had three [17] appeals. Every issue that he has raised in his present motion has been thoroughly ventilated in the D.C. Court of Appeals. He has a right to appeal and he has not, to my knowledge, appealed any of those issues to the Supreme Court. He clearly has that right. He may go back to the trial judge, Judge Murphy, and either file a motion for new trial under 23-110, raising either any of these issues again or any other issue that may now appear to have merit.

THE COURT: As to the issues that have been resolved by the D.C. Court of Appeals, does the writ lie?

MR. KACZENSKY: No, I would submit it does not, under either the straight theory of jurisdiction in the Congress—

THE COURT: Or under the law of habeas corpus.

MR. KACZENSKY: Or under the law of habeas corpus.

If Your Honor was sitting in Virginia, over in Alexandria or Arlington court, Your Honor would, upon proper pleadings, I submit, have no choice but to feel he lacked jurisdiction. It is not whether he wins or loses; it is whether he has got a remedy available; and he clearly has a remedy available even if you took the state court Federal Court parallel, which I submit is not proper.

Indeed, Palmore is important. It didn't reach this issue but it did indicate in the Roman numeral 2 section of its opinion that reference to state statute would not ordinarily include the provisions of the District of Columbia Code; and [18] they indicate that the District of Columbia is constitutionally distinct from the states, so the state-Federal parallel doesn't apply. Although there hasn't been a firm, crystal clear holding, I think it is fairly apparent that you do have a state-Federal situation in any case.

Therefore, I should submit that this Court lacks jurisdiction. With respect to the merits, we would rely entirely on the record in the D.C. Court of Appeals. We think that—

THE COURT: Well, the merits really aren't before me. I don't have any record.

MR. KACZENSKY: That is correct. At any rate—

THE COURT: I came on the bench with the idea of saying that the Court had no jurisdiction. I do want to read those news papers that Mr. Archer has handed up, which I have not read.

I will file a memorandum in the next two or three days.

MR. KACZENSKY: Thank you very much, Your Honor.

THE COURT: Thank you, gentlemen.

MR. ARCHER: May I approach the bench on something else?

THE COURT: Another matter?

MR. ARCHER: This has to do with the release of Mr. Pressley. We were advised if you advised the Marshals that Mr. Pressley could be released because he is on furlough. Otherwise he will have to go back to Lorton.

[19] THE COURT: I don't know anything about that.

MR. ARCHER: I have his furlough papers here.

THE COURT: I think he had better go back to Lorton and be released from Lorton.

(Whereupon the hearing was concluded.)

CERTIFICATE OF COURT REPORTER

I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled cause on July 16, 1973 and that the foregoing Pages 1 to 19, inclusive, constitute the official transcript.

/s/ Ida Z. Watson

DISTRICT OF COLUMBIA
COURT OF APPEALS

JANUARY TERM, 1972

[District of Columbia Court of Appeals, Filed May 22, 1972, Alexander L. Stevas, Clerk]

No. 6063

6733-71-A-B

JASPER C. PRESSLEY, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia, Criminal Division

BEFORE: Hood, Chief Judge, Kern and Gallagher, Associate Judges.

JUDGMENT

This case came on to be heard upon the record of the Superior Court of the District of Columbia and was briefed and argued by counsel.

On consideration whereof, and after review of the record and briefs, the Court is of the opinion that the record discloses no error affecting the substantial rights of appellant. D.C. Code 1967, § 11-721(e) (Supp. IV, 1971).

Accordingly, it is this 22nd day of May, 1972,

ORDERED and ADJUDGED that the judgment be, and it hereby is, affirmed.

PER CURIAM.

FOR THE COURT:

/s/ Alexander L. Stevas,
ALEXANDER L. STEVAS,
Clerk.

Copies to:

Honorable Tim C. Murphy
Judge, Superior Court of the District of Columbia.

Clerk, Superior Court of the District of Columbia.

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Attorney for Appellee.

DISTRICT OF COLUMBIA
COURT OF APPEALS

JANUARY TERM, 1973

[District of Columbia Court of Appeals, Filed March 2, 1973, Alexander L. Stevas, Clerk]

No. 6631

6733-71-A-B

JASPER C. PRESSLEY, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia, Criminal Division

BEFORE: Kern and Harris, Associate Judges, and Hood, Chief Judge, Retired.

JUDGMENT

This is an appeal from the trial court's denial of appellant's motion for a new trial after his conviction for grand larceny and larceny from the government was affirmed by this court's judgment entered in May 1972. *Pressley* v. *United States*, D.C.App., No. 6063.

Appellant argues that the decision of his trial counsel not to move to suppress the typewriter seized by police from his residence pursuant to a search warrant constituted such gross incompetence as "blotted out" the essentials of his defense at trial. *See Bruce* v. *United States*, 126 U.S.App.D.C. 336, 340, 379 F.2d 113, 117 (1967); *Scott* v. *United States*, D.C.App., 259 A.2d 353, 354 (1969). Appellant vigorously contends (Br. at 4) that a suppression motion "could have been based upon lack of probable cause for issuance of a search warrant and on improper execution of said warrant" because (1) the affidavit in support of the warrant was

based upon information supplied by an informant whose credibility and reliability did not meet the test set forth in *Aguilar* v. *Texas*, 378 U.S. 114 (1963), and (2) the serial number of the typewriter seized differed from the serial number contained in the affidavit in support of the search warrant.

We are not persuaded, despite the forceful and thorough argument presented on behalf of appellant, that his counsel's determination not to move to suppress the typewriter constituted professional incompetence. *See Harried* v. *United States*, 128 U.S.App.D.C. 330, 335, 389 F.2d 281, 286 (1967). The affidavit contained specific and detailed information given by a named person who had returned to the police earlier certain property he himself had stolen. It also contained the purported serial number of the most recently stolen typewriter. Thus, we see no violation of the requirements of *Aguilar*. *United States* v. *Harris*, 403 U.S. 573, 583-84 (1971). The warrant itself did not contain a serial number. The discrepancy between the serial number in the affidavit and the one on the IBM typewriter seized resulted from a "calling" error on the part of the District of Columbia agency reporting the machine's theft to police, and the officer executing the warrant verified directly with the agency itself during execution of the warrant the correct number of the missing typewriter and matched it against the number of the typewriter seized. Certainly the executing officer was not required to ignore items which he had probable cause to believe had been stolen. *United States* v. *Yates*, D.C. App., 279 A.2d 516, 517 (1971).

Accordingly, it is this 2nd day of March 1973,

ORDERED and ADJUDGED that the denial of the motion is affirmed.

PER CURIAM.

FOR THE COURT:

/s/ Alexander L. Stevas,
ALEXANDER L. STEVAS,
Clerk.

Copies to:

Honorable Tim Murphy
Judge, Superior Court of the District of Columbia

Clerk, Superior Court of the District of Columbia.

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John A. Terry, Esquire
Assistant United States Attorney
Attorney for Appellee.

DISTRICT OF COLUMBIA
COURT OF APPEALS

JANUARY TERM, 1973

[District of Columbia Court of Appeals, Filed July 6, 1973, Alexander L. Stevas, Clerk]

No. 6803

6733-71-A-B

JASPER C. PRESSLEY, APPELLANT

v.

UNITED STATES, APPELLEE

Appeal from the Superior Court of the District of Columbia, Criminal Division

BEFORE: Kern and Harris, Associate Judges, and Hood, Chief Judge, Retired.

JUDGMENT

Appellant filed in the trial court a "Motion for Production of Grand Jury Voting in Case Number 6733-71" some 16 months after he had been indicted and some 13 months after he had been convicted in that particular case.[1] The present appeal is from the trial court's denial of his Motion.[2]

Appellant urges that the grand jury "voting records" should have been made available to him in order to determine whether 12 or more grand jurors had voted to

[1] This court affirmed appellant's conviction by an unpublished judgment. *Pressley* v. *United States*, D.C.App., (No. 6063, May 22, 1972).

[2] Although appellant at the time of filing this Motion had an appeal pending in this Court, the trial court had jurisdiction to deny such motion. *See Franklin* v. *United States*, D.C.App., 293 A.2d 279, 280 (1972); *King* v. *United States*, D.C.App., 271 A.2d 556, 558-59 (1971).

indict him. After consideration of the record and appellant's arguments on brief and orally we are of opinion that his contention that he is now entitled to the Grand Jury's vote many months ago is without merit and his Motion was properly denied. Super. Ct. Cr. R. 12(b).

Accordingly, it is this 6th day of July 1973,

ORDERED and ADJUDGED that the judgment is affirmed.

PER CURIAM.

FOR THE COURT:

/s/ Charles J. Rumsey,
CHARLES J. RUMSEY,
Chief Deputy Clerk.

Copies to:

Honorable Tim Murphy
Judge, Superior Court of the District of Columbia.

Clerk, Superior Court of the District of Columbia.

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Attorneys for Appellant.

John A. Terry, Esquire
Assistant United States Attorney
Attorney for Appellee.

III. *Order in Respect to Both Cases*

SUPREME COURT OF THE UNITED STATES

No. 75-811

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

ROOSEVELT F. PALMORE; and

C. L. SWAIN, SUPERINTENDENT, LORTON REFORMATORY, PETITIONER

v.

JASPER C. PRESSLEY

ORDER ALLOWING CERTIORARI. Filed February 23, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 205074 240

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

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SUPREME COURT, U.S.

C. L. SWAIN :

Petitioner :

vs. : No. 75-811

JASPER C. PRESSLEY :

Respondent :

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT PRESSLEY

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

C. L. SWAIN :

Petitioner :

vs. : No. 75-811

JASPER C. PRESSLEY :

Respondent :

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF RESPONDENT PRESSLEY IN OPPOSITION

This brief is submitted on behalf of the respondent, Jasper C. Pressley, in opposition to the petition for a writ of certiorari filed by C. L. Swain, the superintendent of Lorton Reformatory. Mr. Pressley argues that this case, which involves a question of interpretation of a statute applicable solely to persons convicted by the Superior Court for the District of Columbia, was correctly decided by an eight-judge majority of the United States Court of Appeals for the District of Columbia Circuit sitting en banc. The decision of the court below was supported by normal and usual principles of statutory interpretation and reached a result that effectuated the intent of Congress. Mr. Pressley therefore submits that review by this Court would be inappropriate and that the petition for a writ of certiorari should be denied.

-1-

Additional Constitutional and
Statutory Provisions Involved

28 U.S.C. § 2241 provides:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless --
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
>
> (5) It is necessary to bring him into court to testify or for trial.
>
> (d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody

-2-

> or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination. 1/

Article I, Section 9, Clause 2 (the Suspension Clause) of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Article III, Section 1 of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Counterstatement of the Case

On May 11, 1973, Jasper C. Pressley, a prisoner at the Lorton Reformatory, filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia. Mr. Pressley's

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1/ Petitioners quote 28 U.S.C. § 2255 in their "Constitutional and Statutory Provisions Involved." While Section 2255 may or may not be helpful in interpreting Section 110(g) of the D. C. Code, depending upon the view this Court ultimately takes, Mr. Pressley disputes any suggestion that Section 2255 is in any way directly involved in this case.

sentence had been imposed pursuant to a 1971 conviction of larceny in the Superior Court for the District of Columbia. 2/ The petition he filed in the United States District Court alleged that he had been denied effective assistance of counsel at his trial in violation of his rights under the Sixth Amendment of the United States Constitution.

In the district court, the government pleaded 23 D. C. Code § 110(g) as a jurisdictional bar. The trial court dismissed the petition on the grounds that the "Court does not have jurisdiction over this matter, by virtue of 23 D.C. Code § 110(g)." 3/

Mr. Pressley appealed to the United States Court of Appeals for the District of Columbia Circuit, where his case was

---

2/ On April 22, 1971, a jury sitting in the Superior Court for the District of Columbia, convicted Mr. Pressley of grand larceny (22 D.C. Code § 2201), and larceny from the District of Columbia government (22 D.C. Code § 2206). The charges arose from the disappearance of a government-owned typewriter from an office where Mr. Pressley was employed. On October 1, 1971, Mr. Pressley was sentenced to concurrent prison terms of 32 to 96 months on the grand larceny conviction and 20 to 60 months on the conviction for larceny from the District of Columbia government. Mr. Pressley appealed and his conviction was affirmed without opinion by the District of Columbia Court of Appeals. Mr. Pressley then collaterally attacked his conviction alleging ineffective assistance of counsel. His attack was denied by the trial court without a hearing, and the denial was affirmed by the District of Columbia Court of Appeals in an unpublished opinion. It was after this affirmance that Mr. Pressley filed his petition for a writ of habeas corpus in the United States District Court for the District of Columbia.

3/ Pet. A. at page 66a. "Pet. A." refers to the appendix filed in this Court with the petition for certiorari.

briefed [4/] and argued en banc. A majority consisting of eight of the nine judges who heard the case reversed the district court's dismissal, holding that 23 D.C. Code § 110(g) requires exhaustion of local remedies and thus is no bar to ultimate constitutional adjudication in the inferior Article III courts in the District of Columbia. Accordingly, the case was remanded for a hearing on the merits of the habeas corpus petition.

The government seeks a writ of certiorari in this Court.

Argument

The petition asserts that the Court of Appeals in this case ignored the literal meaning of the statute that was before it and thereby so radically departed from established norms of statutory construction as to warrant an exercise of this Court's discretionary review by certiorari. Examination of Judge Tamm's careful and extensive opinion for the eight-judge majority shows that the court below examined the context, history and implications of the statute in question and then, adhering to well-established principles of statutory construction, reached a reasonable interpretation of the statute's meaning. The interpretation adopted by the Court of Appeals gave full effect to the

4/ Though the government had not raised the issue in the district court or on appeal, the Court of Appeals sua sponte remanded the record in Mr. Pressley's case to the district court for a clarification of whether the district court had dismissed the petition because of any failure on respondent's part to exhaust his remedies in the local courts before filing in the district court. The district court responded to the remand by stating that it had dismissed the habeas corpus petition not because of the alleged jurisdictional bar of 23 D.C. Code § 110(g) but instead because of a failure of respondent to exhaust his local remedies. The exhaustion issue was then briefed in the Court of Appeals, and that court's opinion in this case found that respondent had in fact exhausted his local remedies. The government did not raise the issue of exhaustion in the district court; conceded the issue in the Court of Appeals; and does not seek to bring it before this Court by certiorari.

apparent intent of Congress and made the statute harmonious with the overall plan of the act of which it is a part.

A. The Result Reached by the Court of Appeals Was Consistent With the Legislative History and the Intent of Congress

The petition for certiorari states that the Court of Appeals so radically departed from traditional notions of statutory construction as to warrant review by this Court. In fact, it was the petitioner who argued for a radical interpretation of 23 D.C. Code § 110(g) in the court below. Having failed to show that the instant case is significant or unusual, petitioner asks this Court to redecide the question of statutory interpretation that he lost in the court below.

The petitioner argues that 23 D.C. Code § 110(g), which is a subsection of a statute creating a right to collateral attack by post-conviction motion in the Superior Court for the District of Columbia, should be read to bar the doors of the inferior Article III courts to Superior Court prisoners for ultimate review of their federal constitutional claims. The petitioner seeks to erect a grant of power to the Superior Court into an implied repeal of the jurisdiction of the inferior Article III courts in the District of Columbia to decide federal constitutional questions once local remedies have been exhausted.

The Court of Appeals, after the fullest consideration, rejected the petitioner's argument. The petitioner was not able to point to any persuasive evidence that the Congress intended to make such radical and unprecedented inroads into the traditional habeas corpus jurisdiction of the inferior Article III courts. That jurisdiction, which is nationwide, came into being as part of the Judiciary Act of 1789, [1 Stat. 73], and has remained undisturbed for 200 years.

In addition, the Court of Appeals declined to read 23 D.C. Code § 110(g) in a manner that would take it out of consonance with the aims and design of the act of which it is a part. Instead, the court chose an interpretation of the

statute that brought it into harmony with the objectives and plan of the new District of Columbia court system. The petitioner's suggested reading of the statute, while it can be reached by a hyper-literal reading of the words of the statute, seemed to the Court of Appeals not to be consonant with the intent of Congress when seen against the background of the context, history, and implications of the statute in question.

The whole act -- the District of Columbia Court Reform and Criminal Procedure Act, Pub.L. No. 91-368, 84 Stat. 473 ("Court Reform Act") -- is a broad plan to create in the District of Columbia an Article I court system completely equipped with the power to try criminal cases; to review them on direct appeal; to hear collateral attack by post-conviction motion; and to entertain writs of habeas corpus. Section 110 of Title 23 simply makes it clear that the Congress contemplated that post-conviction review of criminal cases in the new Superior Court would be by motion rather than by the more complex procedure of habeas corpus.[5/]

The particular statute in question here -- 23 D.C. Code § 110(g) -- is a subpart of the section of the Court Reform Act that establishes for the first time an explicit statutory procedure for post-conviction attack by motion in criminal cases in the new local Article I court system for the District of Columbia.

Subsection 110(g) was read by the Court of Appeals in this case to codify the doctrine of exhaustion of local

---

5/ The motions procedure of Section 110, which only entails a motion in the context of an existing criminal case, is vastly simpler than habeas corpus which requires filing a new case, serving process and so on. However, Congress also provided for a plenary habeas corpus power in the local courts. 16 D.C. Code § 1901. Challenges to conditions of prison confinement, confinement by parents in domestic relations cases, confinement by other private individuals, and suits by prisoners held in lieu of bail and not yet convicted would be examples of cases appropriately litigated under the D. C. habeas corpus statute and not under the 23 D.C. Code § 110 motions procedure.

remedies, thereby insuring that the federal courts would not be faced with constitutional questions unless every effort had been made to resolve them in the context of the new local court system.

In reaching this conclusion, Judge Tamm's opinion examined the legislative history of the Court Reform Act and concluded that, far from supporting the petitioner's argument that Section 110(g) was intended to invade the traditional habeas corpus jurisdiction of the district court, the legislative history tended more to undermine petitioner's position. In fact, the legislative history and decisions of this Court showed that in passing the Court Reform Act Congress intended to create a dual system of local and federal courts that would parallel the relationship of the state and federal courts in almost all respects. Palmore v. United States, 411 U.S. 389, 408-09 (1973); Pernell v. Southall Realty, 416 U.S. 363, 367 (1974).

Of course, in the various states, the federal courts are open for adjudication of the constitutional claims of prisoners who have exhausted their remedies in the state court systems. The petitioner's suggested reading of the statute would significantly depart from the state/federal model by closing the District of Columbia inferior Article III courts to the same questions to which they are open in every other jurisdiction in the nation. To bring Section 110(g) into line with the balance of the Court Reform Act, the Court of Appeals concluded:

> The interpretation of section 110 most harmonious with this federal-state analogy is clearly appellant's, which would allow the district court to entertain petitions for collateral review in the same manner as district courts do for the fifty states. In fact, it would not be inaccurate to state that the district court's holding is flatly inconsistent with this congressional purpose. Nowhere is there any indication that the federal-state analogy was

> subject to certain jurisdictional exceptions or that the district court here would possess less jurisdiction than in other districts. In fact, 11 D.C. Code § 501 (1973) defines the civil jurisdiction of the district court, which includes habeas corpus, by initially stating that "[i]n addition to its jurisdiction as a United States district court." The only construction of section 110 consistent with this analogy is that Congress never intended to affect the district court's habeas jurisdiction. Pet. A. at p. 35a. (footnote omitted)

When the Court of Appeals turned to examine the legislative history of this particular section of the act, once again, rather than finding support for petitioner's argument, it found evidence to the contrary. It found that Congress had made no mention of any intention to make the collateral attack aspect of the new court system different from the state/federal analogy. The court found no mention of any Congressional intention to provoke a major change in the habeas corpus jurisdiction of the United States District Court for the District of Columbia. It found instead that Congress had characterized 23 D.C. Code § 110(g) as being modeled on 28 U.S.C. § 2255 "with only the necessary technical changes."[6/]

Congress did not go on to say what the changes were "necessary" for. But the court below reasonably assumed that the technical changes were necessary to bring this subsection

---

6/ S. Rep. No. 91-405, 91st Cong., 1st Sess. 38 (1969). The petitioner tries to inflate the fact that the words of Section 110(g) and Section 2255 are mostly the same into an argument that therefore their meanings ought to be exactly the same. The Court of Appeals rejected this argument, not only for its formal illogicality, but also for the more important reason that it ignores the dramatically differing purposes of the two statutes. Section 2255 was designed to distribute the judicial business evenly over the whole federal court system. United States v. Hayman, 342 U.S. 205, 210-224 (1952). No parallel problem exists within the District of Columbia. See, Pet. A. at pp. 28a-30a.

into conformity with the scheme of the act as a whole. Thus, what legislative history there is supported the conclusion of the Court of Appeals. It would have been particularly unreasonable to assume that one slender paragraph of legislative history would signal a dramatic modification in the habeas jurisdiction of the inferior Article III courts, which has remained unchanged since 1789.

The scanty legislative history of Section 110 was in stark contrast to the furious debate in Congress provoked by attempts before and after the passage of the Court Reform Act to reduce the habeas corpus jurisdiction of the inferior Article III courts. See Pet. A. at pp. 38a-41a.

In line with the design of the Court Reform Act and with the legislative history of the whole act and subsection 110(g) in particular, the Court of Appeals found that the intention of Congress was to divide the judicial business of the District of Columbia so that the local courts handled local matters, such as the trial of local crimes, and the federal courts concerned themselves exclusively with federal matters. "Federal matters" appropriately included adjudication of federal constitutional questions raised by Superior Court prisoners who had exhausted their local remedies just as in the various states. There was simply no basis for deciding that Congress had intended anything else.[7/]

7/ Indeed, Judge Tamm was moved to remark:

> The Government argues that the legislative history reveals "that the United States District Court for the District of Columbia would no longer be burdened with so much business of a purely local nature, not that the court would henceforth have precisely the same jurisdiction." (footnote continued)

B. The Court of Appeals Followed Well-Established Principles of Statutory Construction

While generalized principles of statutory construction rarely solve specific problems, the reading of 23 D.C. Code § 110(g) adopted by the Court of Appeals is solidly grounded in the law of statutory construction. Petitioner is really arguing that the Court of Appeals departed from those selected principles of statutory construction that lead to his result.

The Court of Appeals followed the general rule that statutes should not be read so as to achieve incongruous results or so as to put one section out of harmony with the whole. As this Court said in another context in Ozawa v. United States, 260 U.S. 178, 194 (1922):

> It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. (citations omitted) We are asked to conclude that Congress, without consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change, nevertheless, by failing to alter the identifying words (of the statute there in question), which section we may assume was continued for some serious purpose, has radically modified a statute always theretofor maintained and considered as of great importance. It is inconceivable that a rule in force from the beginning of the government -- a part of our history as well as our law, welded into the structure of our national policy, by a century of legislative and administrative acts and judicial decisions -- would have been deprived of its force in such a dubious and casual fashion. See, Pet. A. at pp. 41a-42a. 8/

The Court of Appeals applied the Ozawa guideline in rejecting petitioner's reading of the statute because that reading would have achieved a radical result without any clear statement of any intention on the part of Congress to do so. 9/

7/ continued

> Gov't Br. at 29 (emphasis added). We must reject this latter suggestion because we believe it flies in the face of clear legislative history and consistent contrary court interpretations. In fact, we are surprised that the Government seriously advances it when it even quotes from the Senate Conference Managers:
>
> > the Federal district court for the District of Columbia is to regain its rightful status as a Federal tribunal, devoted on a fulltime basis to Federal business, like all other United States district courts.
>
> Statement (of the Managers on the Part of the Senate Submitted Regarding the Conference Action Upon S. 2601, the President's Crime Legislation for the District of Columbia, 91st Cong., 2d Sess. 2 (1970) at p. 5). Pet. A., note 39 at p. 35a.

-11-

-11-

8/ Justice Frankfurter wrote:

> Our problem is not what do ordinary English words mean, but what did Congress mean them to mean.

Commissioner v. Acker, 361 U.S. 87, 95 (1959) (Frankfurter, J., dissenting).

9/ Petitioner's "literal" reading would also have had other consequences that Congress gave no evidence of intending:

> 1) The language of 23 D.C. Code § 110(g) that petitioner argues would bar the United States District Court from hearing this habeas corpus petition is so broad ("shall not be entertained. . . by any Federal . . . Court") that, if read literally, it would also bar this Court from hearing a petition for an original writ of habeas corpus in this case. While this

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-12-

By petitioner's proposed reading of the statute, a part of the United States District Court's habeas corpus jurisdiction granted by 28 U.S.C. § 2241 was repealed by 23 D.C. Code § 110(g). This repeal would be by implication. Section 110(g) itself does not mention Section 2241, and Congress did not amend 28 U.S.C. § 2241 when it passed 23 D.C. Code § 110(g).

Of course, implied repeals are not favored, 1A Sutherland, Statutory Construction § 23.10 (4th ed. 1973), especially where the repeal would be of a jurisdictional statute. Lynch v. Household Finance Corp., 405 U.S. 538, 549 (1972). The Court of Appeals pointed out that this Court had recently held that:

9/ continued

> Court's original writ has been seldom exercised, nevertheless, it does exist. Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869). The petitioner presumably wants "any Federal Court" to be read "literally" to include the district court but not to include this Court.
>
> 2) Section 110, Title 23, by its terms applies only to those prisoners convicted in the Superior Court. By implication, persons imprisoned by the Superior Court but not yet convicted, such as those held in lieu of bail, can be heard in the Article III courts on habeas corpus. If Congress' sole intention was to reduce the number of local criminal cases that can ever find their way into the inferior Article III courts, it would have been anomalous to cut out some, but not all, of the district court's habeas jurisdiction without at least suggesting what distinction was made or why.
>
> 3) From any early date, the Supremacy Clause has been interpreted to mean that state courts cannot entertain habeas corpus petitions on behalf of those confined by the United States. Tarble's Case, 80 U.S. (13 Wall.) 397 (1872); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859). However, the words "shall not be entertained . . . by any . . . State court . . . unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention" can be "literally" read to mean that a state court, on a showing of inadequacy or ineffectiveness, could grant the writ and set a prisoner of the United States free.

> "'this canon of construction (disfavoring implied repealers) applies with particular force when the asserted repealer would remove a remedy otherwise available.' Schlesinger v. Councilman, ____ U.S. ____, 95 S. Ct. 1300, 43 L.Ed.2d 591 (1975)." Pet. A. at pp. 30a-31a.

Petitioner's implied repeal argument seems particularly dubious in light of the fact that Congress extensively amended the balance of Title 28 to bring it into conformity with the Court Reform Act. See Pet. A. at pp. 32a-33a.

The Court of Appeals also followed the time-honored principle of statutory interpretation that requires that where the court is faced with competing readings of a statute, one of which raises substantial constitutional issues and the other of which does not, the court should avoid unnecessary constitutional adjudication. Pet. A., fn. 8 at p. 8a, citing United States v. Rumely, 345 U.S. 41, 45 (1953); Crowell v. Benson, 285 U.S. 22, 62 (1932); The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86, 101 (1903).

The Court of Appeals concluded that any construction of the statute that cut off the right of those confined by the United States government to seek ultimate constitutional adjudication in the inferior Article III courts would raise troublesome constitutional questions, which are more fully discussed in the next section of this brief. These questions have been repeatedly recognized and referred to by this Court, but never squarely decided. The Court of Appeals declined to launch itself into such uncharted constitutional waters but instead followed the example of this Court in choosing the less constitutionally ramified course.

The decision of the Court of Appeals preserves the traditional habeas corpus jurisdiction and thereby makes no new law. A contrary decision by the Court of Appeals holding that Congress does have the power to remove the writ from the inferior Article III courts in the District of Columbia would have nationwide implications in terms of Congress' as-yet-undefined power to

modify the writ. Against this background, the disinclination of the Court of Appeals to tackle undecided constitutional questions seems particularly appropriate in the context of a statute of such limited application.

A review of the opinion of the Court of Appeals shows that the court adhered to well-established principles of statutory construction in reaching the result that it did.

B. Petitioner's Reading of the Statute Raises Substantial Questions of Constitutional Law Which Have Been Recognized But Not Decided By This Court

The contested statute, 23 D.C. Code § 110(g), is not the first statute passed by Congress that has been argued to have restricted the habeas corpus jurisdiction of the inferior Article III courts. But there is a constant and unmistakable thread running through this Court's opinions on the subject for the last hundred years: since the parameters of the writ protected by the Suspension Clause of the Constitution are difficult to discern, the question should be avoided where possible. Accordingly, this Court has always been careful to scrutinize the intent of Congress so as to be able to avoid confronting this troublesome constitutional question when it can be avoided consistent with that Congressional intent. The history of these Supreme Court cases is carefully analyzed in the opinion of the Court of Appeals, and the lesson carefully applied to the problem at hand.

Perhaps the most strikingly analogous precedent arose from a 1948 statute which, if read mechanistically, would have created an exclusive post-conviction remedy in the Article I military justice system and thereby cut off the inferior Article III courts' habeas corpus jurisdiction. The statute, 62 Stat. 639, would have made post-conviction rulings of the Article I military courts "final and conclusive" and "binding upon all . . . courts. . . of the United States." A wooden reading of those words would have prevented the Article III courts from further considering the constitutionality of detentions in the Article I

military courts. But this Court declared:

> We read the finality clause . . . as doing no more than describing the terminal point for proceedings within the court-martial system. If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable. The finality language so adequately serves the more restricted purpose [of exhaustion] that we would have to give a strained construction in order to stir the constitutional issue that is tendered. Gusik v. Schilder, 340 U.S. 128, 132-33 (1950) (footnote omitted).

Carefully adhering to the Gusik precedent, the Court of Appeals read Section 110(g), which petitioner argues achieves the same drastic result that was argued for in Gusik, in the same way this Court read the statute in Gusik -- as an exhaustion statute.

This Court has followed the same course in reading statutes that were argued to insulate decisions of the immigration and naturalization authorities from habeas review in the inferior Article III courts. The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903); United States v. Jung Ah Lung, 124 U.S. 621 (1888); Chin Yow v. United States, 208 U.S. 8 (1908). In all of the cited cases, this Court rejected readings of the immigration statutes that would have cut off habeas and thereby raised thorny constitutional questions. The Court of Appeals considered and followed these immigration cases.

Finally, this Court's reading of 28 U.S.C. § 2255 was considered and applied by the Court of Appeals. When Section 2255 was enacted, it was attacked as an unconstitutional derogation of the inferior Article III courts' habeas corpus jurisdiction. Hayman v. United States, 187 F.2d 456 (9th Cir. 1951). However, when the case came before this Court, the statute was construed

in a way that avoided the constitutional question. United States v. Hayman, 342 U.S. 205 (1952). This Court held that the post-conviction motion procedure prescribed by 28 U.S.C. § 2255 could pass constitutional muster only if its reach were exactly commensurate with that of habeas corpus. Finding that Section 2255 was exactly commensurate with habeas corpus, this Court upheld the statute's constitutionality. Once again, this Court adopted a reading of the statute that avoided a collision with the Suspension Clause.

Since Hayman, this Court has continued to read Section 2255 so that the constitutional problem was avoided. See, Sanders v. United States, 373 U.S. 1, 13 (1963), where this Court pointed out that in Hayman it had "avoided the constitutional question by holding that Section 2255 was as broad as habeas corpus."

Faced with explicit recognition by this Court that there are substantial undecided constitutional questions in this area, the Court of Appeals correctly decided that it could not brush these troubles aside, as the petitioner in this case does. Instead the court below identified these problems and appropriately avoided them consistent with the intention of the legislature.

The constitutional right that Mr. Pressley asserts is unique in our jurisprudence. The power to entertain writs of habeas corpus is nowhere affirmatively granted in our Constitution. The Suspension Clause merely protects from interference a power that is assumed to exist. This power is the power to review the legality of confinement and, Mr. Pressley argues, it inheres in every inferior Article III court.

Mr. Pressley asserts the right of every person[10/] confined by the authority of the United States to test the constitutionality of his confinement in the inferior Article III courts once he has first exhausted whatever other remedies he may have. This Court has never been forced to determine the exact limits of the rights protected by the Suspension Clause. Mr. Pressley submits that his case, involving a statute of limited local application, is not an appropriate vehicle for such a momentous decision, which can be appropriately avoided while at the same time giving full effect to the apparent intention of Congress.

10/ In addition to the more obvious category of criminal prisoners, the right to a writ in the inferior Article III courts extends to persons detained by the military, Burns v. Wilson, 346 U.S. 137 (1953); persons inducted into the armed forces, Oestereich v. Selective Service, 393 U.S. 233, 235 (1968); reservists ordered to active duty, Linsalata v. Clifford, 290 F. Supp. 338 (S.D.N.Y. 1968); persons detained by the immigration and naturalization authorities, including not only citizens but also resident aliens about to be deported, Ng Fung Ho v. White, 259 U.S. 276 (1922), and friendly aliens seeking to enter this country, Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); persons tried and convicted by territorial courts, Maldonado v. Delgado, 345 F. Supp. 993 (D.C.P.R. 1972); Rivera Escute v. Delgado, 439 F.2d 891 (1st Cir. 1971); persons tried and convicted in Indian tribal courts, Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); persons committed to federal mental hospitals, Stewart v. Overholser, 87 U.S. App. D.C. 402, 186 F.2d 339 (1950); and persons subject to interstate extradition proceedings, Roberts v. Reilly, 116 U.S. 80 (1885). If the petitioner is correct, United States citizens convicted of crimes by the Superior Court for the District of Columbia would be the only persons excluded.

Conclusion

This case presents none of the usual considerations that move this Court to grant certiorari.[11/] Examination of the opinion of the Court of Appeals demonstrates that the statute was thoughtfully read in conjunction with the intent of Congress and established principles of statutory construction; the right to be heard on habeas corpus in the inferior Article III courts, if such a right exists, was preserved; and the case was correctly decided. Therefore, the petition for a writ of certiorari should be denied.

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11/ Of course, this is not a case in which there is likely to be, nor is there, a split of authority among the inferior courts. Nor does this case present a question affecting large numbers of cases. The petitioner's statistical argument, presented in footnote 10 at page 18 of the petition for certiorari, is subject to varying interpretations. If the total number of defendants who appealed their Superior Court convictions in the first eleven months of 1975 was 120, then the number of prisoners who would have constitutional questions appropriate for federal review would be even less.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-811

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA, et al.,

Petitioners,

v.

ROOSEVELT F. PALMORE,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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III

IN THE
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October Term, 1975

No. 75-811

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Petitioners,

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ROOSEVELT F. PALMORE,

Respondent.

On Petition for Writ of Certiorari
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for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, is reported at 515 F.2d 1294, and is reproduced in the Petition for Writ of Certiorari (Pet. at 1a-52a). The memorandum order of the United States District Court for the District of Columbia is not officially reported, but is also set forth in the petition (Pet. at 55a-56a).

Jurisdiction

The judgment of the Court of Appeals was entered on July 9, 1975. By order entered October 9, 1975, the Chief Justice extended the time for filing a petition for writ of certiorari to and including November 6, 1975. By a second order, entered on October 29, 1975, the Chief Justice further extended the time for filing a petition for writ of certiorari to and including December 6, 1975. The petition was filed on December 5, 1975, and this Court's jurisdiction was invoked pursuant to 28 U.S.C. § 1254(3). The jurisdiction

of the United States District Court in this case was invoked pursuant to 28 U.S.C. §§ 2241 et seq. and, alternatively, pursuant to 28 U.S.C. § 1331.[1/]

Reasons for Treating the Cases Separately

To avoid confusion with the other respondent in this multi-case petition, we refer throughout this opposition to "Palmore" instead of the more customary "respondent". While we do not question the permissibility under Rule 23(5) of the Rules of this Court of the filing of a single petition, these cases were not consolidated in either of the courts below and there are some potentially significant differences between the cases. For example, implicated in Pressley are questions of exhaustion and jurisdiction over the custodian (Pet. at 14 n.9, 20 n.11) which are not involved in Palmore's case. Conversely, Palmore, unlike Pressley, alternatively invoked the jurisdiction of the District Court pursuant to 28 U.S.C. § 1331. Consequently, we believe that this Court should consider the single petition as tendering two cases, not one, for review. In particular, if certiorari is to be granted, this Court may well conclude that the writ should issue in one case only (holding the other case for subsequent disposition) or, more appropriately, to grant the writ in both cases, setting each for separate briefing and oral argument as did the Court of Appeals.

1/ Palmore's initial application for writ of habeas corpus invoked only the habeas corpus jurisdiction of the District Court pursuant to 28 U.S.C. §§ 2241 et seq. and under Art. I, § 9, cl. 2 and Art. III § 2 of the Constitution. When petitioners contended in the Court of Appeals that the "plain words" of 23 D.C. Code § 110(g) barred the district judge from exercising his federal habeas corpus jurisdiction, Palmore sought and was granted leave by a unanimous en banc Court of Appeals to amend his jurisdictional allegations pursuant to 28 U.S.C. § 1738. Palmore filed amended jurisdictional allegations in the District Court contending that his case arises directly under the Fourth Amendment to the Constitution, involves an amount in controversy in excess of $10,000, exclusive of interest and costs, and thereby invoked the District Court's jurisdiction pursuant to 28 U.S.C. § 1331. Those amended jurisdictional allegations are now in the record and, as we show infra pp.19-21 , constitute a separate basis for sustaining the judgment of the Court of Appeals in this case.

Questions Presented

1. Did Congress, by enactment of a post-conviction remedy statute applicable to the local District of Columbia courts, 23 D.C. Code § 110, implicitly repeal the habeas corpus jurisdiction of all United States District Courts set forth in 28 U.S.C. §§ 2241 et seq. and, if it did, was Palmore's case nonetheless within the jurisdiction of the United States District Court by virtue of 28 U.S.C. § 1331?

2. If 23 D.C. Code § 110 is read, as petitioners urge, to bar Palmore from all access to the United States District Courts, is that statute unconstitutional because it thereby: (1) constitutes a suspension of the writ of habeas corpus in violation of Article I, § 9, cl. 2 of the Constitution of the United States and (2) deprives Palmore of due process of law in violation of the Fifth Amendment to the Constitution of the United States in that it invidiously discriminates between those persons convicted before the Superior Court of the District of Columbia, on the one hand, and those convicted before any other federal or state court, on the other hand?

Constitutional and Statutory Provisions Involved

In addition to the constitutional and statutory provisions set forth in the petition for writ of certiorari (Pet. at 3-4, 70a-79a), Palmore contends that 28 U.S.C. §§ 1331, 2201-2202, and 2244 are also involved in this case. Pertinent portions of those statutes are set forth in Appendix A, infra.

Statement

Five years ago, two plainclothes officers observed Palmore lawfully driving on a District of Columbia street in a rented automobile. Curious to know whether the vehicle was stolen and whether the driver was properly licensed, the officers, aided by two other plainclothes officers in a second unmarked police cruiser, forced Palmore to the

side of the road with their police siren and red flashers. During the ensuing conversation, in which it developed that Palmore was in possession of a valid license and that the vehicle was not stolen, one of the officers shined a light into the interior of the vehicle and, according to testimony credited by the trial judge, observed in plain view the hammer mechanism of a gun. Palmore was arrested and charged with carrying a gun without a license, a violation of 22 D.C. Code § 3204.

Before his trial in the Superior Court of the District of Columbia, Palmore moved in a timely fashion for an order suppressing the gun as evidence on the ground that it was the fruit of an unreasonable seizure of his person and an unreasonable search of his vehicle. The local trial judge overruled the motion and Palmore was subsequently convicted and sentenced to imprisonment and probation. The District of Columbia Court of Appeals affirmed the conviction after fully considering and rejecting Palmore's Fourth Amendment claim. Palmore v. United States, 290 A.2d 573, 580-584 (D.C. App. 1972). On April 24, 1973, this Court declined to review that facet of the local appellate court's judgment. Palmore v. United States, 411 U.S. 389, 397 n.6 (1973).

On May 15, 1973, Palmore filed an application for writ of habeas corpus in the United States District Court for the District of Columbia. In that petition, Palmore alleged that he was in custody in violation of the Fourth Amendment and that "[n]o judge or court of the United States has determined the legality of [his] detention on the grounds set forth herein, either on prior application for writ of habeas corpus or otherwise." On July 10, 1974, the District Court dismissed Palmore's application for want of jurisdiction. Palmore perfected an appeal to the United States Court of Appeals for the District of Columbia Circuit. That court, which sua sponte heard the case en banc, reversed the District Court's order of dismissal and remanded the case for consideration on the merits of Palmore's Fourth

Amendment claim. One judge dissented. The other eight judges all joined in a single opinion authored by Judge Tamm.

ARGUMENT

After fully considering each of the arguments again advanced by petitioners in this Court, the Court of Appeals held that the District Court had erred in dismissing Palmore's case. While noting that constitutional issues would surface if the federal courts lacked such jurisdiction, the Court of Appeals resisted petitioners' efforts to propel it to resolution of such novel and difficult problems. Instead, faithful to principles of statutory construction firmly rooted in the decisions of this Court, the Court of Appeals concluded that Congress had not intended to affect the jurisdiction of the district courts when it enacted 23 D.C. Code § 110 and thereby provided, for the first time, a statutory post-conviction procedure for the local District of Columbia courts. Judge Tamm could not have been more careful in limiting the holding of the court:

> In conclusion, we emphasize what we do and do not hold today. We hold that section 110(g) does not affect article III habeas jurisdiction. We do so after concluding that Congress never intended that result; if our interpretation is erroneous, Congress stands available to enlarge upon or clarify the statute. [Citation omitted]. We reach no decision on the constitutional issues raised here; while their substantiality affected our consideration of the statute, demarcation of the extent of the constitutional restraints that the equal protection guarantee and the suspension clause impose upon Congress' power to allocate jurisdiction must await the day Congress more explicitly asserts that power. 515 F.2d at 1314; Pet. at 48a.

An application for review by this Court of an 8-1 en banc judgment of the United States Court of Appeals for the District of Columbia Circuit construing a provision of the District of Columbia Code is an unusual event. Whatever the considerations that might otherwise prompt this Court to add to its docket a case involving nothing more than construction of the seventh sub-section of the local District of Columbia post-conviction remedy statute, this petition,

which does no more than to reassert the statutory construction which petitioners unsuccessfully asserted below, hardly presents a truly compelling justification for further consideration here. In any event, as we now demonstrate, the decision of the Court of Appeals is correct and assuredly presents no issue of statutory construction or general importance warranting review here. Moreover, as we separately show, documents furnished to Palmore by the Department of Justice after the Court of Appeals issued its opinion establish that the court correctly construed the statute. Finally, we show that even accepting petitioners' "plain words" theory (Pet. at 15, 21, 22, 24), and putting to one side petitioners' own documents, the judgment of the Court of Appeals is sustainable on grounds other than those relied upon below.

I

The En Banc Court of Appeals Properly Decided this Case

Palmore's application for a writ of habeas corpus alleged that he was in custody[2/] in violation of the Fourth Amendment to the Constitution and that he had exhausted his remedies in the local court system in an unsuccessful effort to regain his liberty. It is therefore clear, as the Court of Appeals held, that Palmore correctly invoked the statutory habeas corpus jurisdiction of the District Court pursuant to 28 U.S.C. §§ 2241 et seq. The nub of this case, therefore, is petitioners' contention that Congress, by enactment of 23 D.C. Code § 110, simultaneously repealed a portion of the district courts' habeas corpus jurisdiction granted by 28 U.S.C. §§ 2241 et seq. so as to exclude from its reach those, such as Palmore, who have

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2/ When Palmore's application for the writ of habeas corpus was filed, he was on bail pursuant to an order of the Superior Court of the District of Columbia, a status constituting custody within the meaning of the federal habeas corpus statutes. Hensley v. Municipal Court, 411 U.S. 347 (1973). The Attorney General of the United States and the Director of the District of Columbia Department of Corrections were also named as respondents to the habeas action since, absent a bail order by the habeas judge, Palmore would have been remitted to their custody. The habeas judge, with the consent of petitioners, entered orders continuing Palmore's bail pending disposition and appeal.

been convicted by the Superior Court of the District of Columbia.[3/]

The Court of Appeals gave meticulous consideration to each of the arguments which petitioners again advance here. While petitioners urged that the meaning of § 110(g) was so plain as to preclude any inquiry beyond the face of the statute, the Court of Appeals was properly mindful that its task was to ascertain and implement the purpose of Congress and that a repeal by implication, particularly of a jurisdictional or remedial statute, is not the ordinary way by which Congress manifests its intent.

In this case, petitioners' plain meaning and repeal-by-implication argument is made even more difficult since two separate legislative codes are involved. Congress was quite careful to amend appropriate jurisdictional provisions set forth in Title 28 of the United States Code to accommodate redistribution of "local" and "federal" judicial power as part of its comprehensive reorganization of the District of Columbia courts.[4/] Given these explicit excisions of the jurisdiction of the district courts, the Court of Appeals concluded that it was quite unlikely that Congress really intended, by opaque reference in the District of Columbia Code, to amend an express jurisdictional grant contained in the United States Code and applicable to all federal district courts wherever they may sit.[5/] Particularly when the jurisdiction at issue was the power to

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3/ This case does not raise the issue of the availability of the writ to examine Fourth Amendment claims. Petitioners did not raise that point in the Court of Appeals and they do not now press for re-examination of cases such as Kaufman v. United States, 394 U.S. 217 (1969).

4/ For example, Congress added 28 U.S.C. § 1363, as part of the Court Reorganization Act, and thereby excised from the jurisdiction of the district courts those cases arising under Acts of Congress applicable exclusively to the District of Columbia. The Court of Appeals pointed to other instances where Congress amended the United States Code to accomplish its jurisdictional purposes. 515 F.2d at 1308; Pet. at 31a-33a.

5/ Congress has carefully distinguished between the effect of provisions in the United States Code, on the one hand, and the District of Columbia Code on the other. 1 U.S.C. § 204. Notwithstanding

issue the writ of habeas corpus which had formed such a fundamental part of the original jurisdiction of the federal trial courts since the Judiciary Act of 1789, the Court of Appeals refused to attribute to Congress the result which petitioners advance solely by reference to the plain words of a single sub-section. Instead, aware that "generalities about statutory construction * * * are not rules of law but merely axioms of experience",[6/] the Court of Appeals turned to the legislative materials and found that a quite different purpose prompted enactment of 23 D.C. Code § 110.

The only explicit legislative reference to § 110 is that contained in the committee reports:

> Section 23-110 is new. Rather than relying on the inherent power of the superior court to review judgments of conviction, the new section provides statutory procedures for post-conviction challenges. Section 23-110 is modeled upon 28 U.S.C. section 2255 with only the necessary technical changes.

S. Rep. No. 91-405, 91st Cong., 1st Sess. 38 (1969); H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 117 (1970).[7/] Read against prior case

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this legislative distinction, we assume arguendo that Congress may, if it choses, amend the United States Code by enacting a provision in the District of Columbia Code although we know of no instance where it has done so without an accompanying United States Code amendment nor has the Government, in the entire course of this litigation, ever cited such an example to us. Our point is not that Congress necessarily lacks power to amend one code by a provision in the other, but rather that an argument for a statutory construction which is forced to rely on that premise is not likely to be an argument in accord with the legislative understanding or intent.

6/ 515 F.2d at 1307; Pet. at 30a-31a. The suggestion that the Court of Appeals thereby departed from accepted principles of statutory construction and ran afoul of the holding of this Court in Caminetti v. United States, 242 U.S. 470, 485-486 (1917), is wholly without merit. Over Justice Sutherland's dissent, this Court long ago dispelled the notion that the plain meaning approach to statutory construction was a rule of law. Boston Sand Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.). See also, Cass v. United States, 417 U.S. 72, 76-79 (1974); United States v. American Trucking Associations, 310 U.S. 534, 545 (1940). If anything was left of the plain meaning point, Professor Arthur W. Murphy of Columbia Law School put the matter to rest with his recently published article, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975). As Professor Murphy notes, "[w]ith the possible exception of the Packard Motor Car Co. case [330 U.S. 485], in no case since American Trucking has the Supreme Court actually refused to look at legislative history." 75 Colum. L. Rev. 1303.

7/ Although the Court of Appeals was unaware of the fact, it has now developed that the language set forth in the legislative reports was submitted to the Speaker of the House of Representatives by the Attorney General of the United States. See infra, pp. 15-19.

law from the local District of Columbia courts which held that no statutory post-conviction remedy existed for local prisoners who were forced instead to rely on the "inherent power" of the local courts for post-conviction relief, the Court of Appeals had no difficulty in ascertaining a legislative intention to create a statutory remedy for the newly created Superior Court. 515 F.2d at 1306-1307; Pet. at 28a-31a. While it was understandable that Congress used its federal post-conviction remedy statute, 28 U.S.C. § 2255, as a model for its new local statute, the Court of Appeals refused to woodenly transplant the judicial construction which accompanies a federal statute enacted in 1948 and addressed to a nationwide federal problem to a local statute enacted in 1970 and designed to fill a void in local jurisdiction. 515 F.2d at 1306-1307; Pet. at 28a-33a.

Instead, the Court of Appeals looked to Congress to determine the appropriate jurisdictions of the two court systems in the District of Columbia. The legislative guidance could not have been more explicit: the local courts were to deal with local matters; the federal courts were to exercise "the jurisdiction exercised by the Federal courts in the several States"; and the resulting court system would be "a Federal-State court system in the District of Columbia analogous to court systems in the several states." S. Rep. No. 91-405, 91st Cong., 1st Sess. 5 (1969); H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 34-35 (1970). A contention, such as petitioners advance here, that the federal courts lack their historic habeas corpus jurisdiction "is flatly inconsistent with this congressional purpose." 515 F.2d at 1309; Pet. at 35a. A construction, such as Palmore urged below, that such a statute must be read as this Court read a not dissimilar statute in Brown v. Allen, 344 U.S. 443 (1953),[8/] not only

8/ Like § 110(g) and 28 U.S.C. § 2255, 28 U.S.C. § 2254, the statute involved in Brown v. Allen, can be read to bar all access to federal courts. Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 176 (1949). In that case, this Court rejected such a reading and construed § 2254 as an exhaustion of remedies provision instead.

accords with the legislative vision of the dual court system in the District of Columbia, but is harmonious with this Court's description of that system. Pernell v. Southall Realty, 416 U.S. 363, 367 (1974); Palmore v. United States, 411 U.S. 389, 408-409 (1973). That the en banc Court of Appeals, after careful consideration of petitioners' arguments, found those contentions incompatible with the statute and the legislative understanding is scarcely a reason for a further review by this Court.[9/]

There is, however, more to this case than the usual problem of selecting one of two alternative readings of a statute. Here, if petitioners' reading of § 110(g) be accepted, extraordinarily difficult constitutional questions must be decided. Fully aware that if the legislature has clearly intended an unconstitutional result a court must not shirk from saying so,[10/] the Court of Appeals resisted petitioners' efforts to force it toward needless constitutional adjudication. Whether, consistently with the Suspension Clause of the Constitution,[11/] Congress may, at one and the same time, ordain and establish an inferior court of the United States pursuant to Article III of the Constitution and then deprive that court of the power to issue a writ of habeas corpus if it finds a citizen being deprived of his liberty in violation of the federal Constitution is a question that strikes to the heart of Article III and the role of the national judiciary. Each time that contention has been raised in this Court, the Court has declined to attribute such an intention to Congress and has instead construed the statute at issue as an exhaustion provision. E.g., Gusik v. Schilder, 340 U.S. 128, 132-133 (1950); Brown v. Allen, 344 U.S. 443 (1953).

9/ Although the Court of Appeals did not know it, the exhaustion reading which it gave to § 110(g) is precisely the reading which Department of Justice personnel involved in the drafting and submission of the statute had articulated in an internal working memorandum. See infra, pp. 15-17.

10/ See 515 F.2d at 1299, 1306; Pet. at 9a, 27a.

11/ U.S. Const., Art. I, § 9, cl. 2.

The Court of Appeals found instructive this Court's unanimous holding in Gusik:

> If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been made plain and unmistakable.

340 U.S. at 132-133 (footnote omitted).

The Court of Appeals found it significant, as do we, that Congress, despite its careful and prolonged debate of other constitutional issues raised by different provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970,[11/] did not even evidence an awareness that it was being asked to deprive the national courts of their habeas corpus jurisdiction over federal constitutional claims, much less a plain and unmistakable intention to do so. 515 F.2d at 1310-1311; Pet. at 38a-41a. Particularly since Congress had so recently engaged in exhaustive debate over the constitutional limits of the Suspension Clause in considering and rejecting another proposal to restrict the availability of the Great Writ,[12/] the Court of Appeals declined to attribute to the same legislature the choice to implicate those issues without debate or discussion in this statute. That is not only exactly the way a court is supposed to construe a statute, particularly one involving a claim of implied repeal of federal habeas corpus jurisdiction,[13/] it is entirely consistent with the deference which one branch of the Government owes another. The Court of Appeals was aware of the ongoing debate involving the use of federal habeas corpus jurisdiction and the proper reach of the national judicial power, and it knew that

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12/ See S. 917, 90th Cong., 2d Sess. § 702 (1968). Senator Tydings, a leading opponent of that bill but a principal architect of this one, solicited the views of 212 legal scholars from 43 law schools on the constitutional issues raised and delivered an extensive speech on those issues. 114 Cong. Rec. 14136-14137, 14183 (1968). The proposal was defeated, chiefly because the Congress had serious doubts as to the constitutionality of such a restriction on the availability of the writ. See, e.g., Paschal, The Constitution and Habeas Corpus, 1970 Duke L.J. 605, 606-607.

13/ E.g., Sanders v. United States, 373 U.S. 1, 14 (1963).

Congress was grappling with the policy and constitutional issues posed by a further legislative proposal to curtail that jurisdiction.[14/] The Court of Appeals discerned no legislative intent to remove the citizens of the District of Columbia from that far-reaching issue of national concern,[15/] nor did it discover a shred of evidence that Congress was aware it had launched for judicial decision in this statute the very constitutional issue it had retained for deliberation in another. In these circumstances, the court quite correctly declined petitioners' invitation, repeated here, to engage in constitutional adjudication.[15/]

Finally, the Court of Appeals continued to shun a supervisory role over the local courts,[16/] and its holding that the habeas corpus jurisdiction of the federal courts was not repealed by creation of a local post-conviction remedy most assuredly does not alter the legislative allocation of jurisdiction between the two court systems. Since reorganization, the courts in the District of Co-

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14/ S. 567, 93d Cong., 1st Sess. (1973). For preliminary discussion of some of the constitutional issues which members of Congress see as posed by the pending legislation, see 119 Cong. Rec. 2220-2247 (1973).

15/ For precisely the same reasons, the Court of Appeals correctly ruled as premature decision of the Fifth Amendment issues which would arise if Congress singled out District of Columbia citizens and barred then from the national courts for resolution of federal constitutional claims arising from local incarcerations while permitting all others, including those incarcerated by judgments of the Court of Military Appeals or the federal territorial courts, to enjoy such a right. That issue is hard enough, but when it is complicated by the fact that in the District of Columbia the same prosecutor is involved in both the local and federal courts and, on petitioners' reading of the statute, can thereby grant or bar access to the national courts by the simple expedient of selecting a federal or local statute on which to base a criminal charge, the problem becomes an extraordinarily difficult one. The Court of Appeals quite properly reserved that point, together with the suspension issue, until the day that Congress manifests an intent to condition entry to the national courts for resolution of constitutional claims upon the happenstance of the code provision which the United States Attorney selects in a given case arising in the District of Columbia.

16/ 515 F.2d at 1298, 1314; Pet. at 5a-6a, 48a-49a. Judge Tamm, author of the en banc opinion, has been particularly sensitive to the delicate relationship between the two court systems in the District of Columbia. Holly v. United States, 464 F.2d 796, 799-800 (D.C. Cir. 1972) (concurring opinion).

lumbia have accommodated their respective jurisdictions quite compatibly using as the beacon the clearly articulated "state-federal" mold by which Congress deliberately fashioned the dual court system.[17] The decision of the Court of Appeals fits precisely into the federal-state relationship deliberately created by Congress and recognized by each of the courts involved while, at the same time, accords to the District of Columbia Court of Appeals its rightful status as the highest court of the District of Columbia.[18]

17/ E.g., Luck v. Baltimore & Ohio Railroad Co., 510 F.2d 663 (D.C. Cir. 1975); M.A.S., Inc. v. Van Curler Broadcasting Corp., 357 F. Supp. 686, 690-691 (D.D.C. 1973); M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. App. 1972); Geisha House, Inc. v. Wilson, 43 L.W. 2152 (D.C. Super. Ct. 1973) (Greene, C.J.). It is not without significance, we submit, that this Court's Advisory Committee has proposed that the Superior Court of the District of Columbia be deemed a "state court" for purposes of the national habeas corpus statutes. Rule 13 of the Proposed Rules Governing Habeas Corpus Proceedings for the United States District Courts, 93 S. Ct. 34, 89 (1973).

18/ Petitioners notwithstanding, there is no dispute between the courts involved in reorganization over the exercise of federal jurisdiction by the federal courts. Only the happenstance of Palmore's custodial status at the time his petition for writ of habeas corpus was filed, see supra at 6 n.2, permits the Government to assert the existence of such a dispute on behalf of petitioner Superior Court. In fact, the reported decisions of the local courts carefully follow the state-federal model which Congress used as the touchstone in its jurisdictional allocations between the local and federal courts. The decision of the Court of Appeals in this case hews that line precisely. That decision also recognizes the proper status of the local court of appeals.

Congress provided that the District of Columbia Court of Appeals is the highest court "of" -- not "in" -- the District of Columbia. 11 D.C. Code §§ 101, 102. As the highest local court, its judgments on matters of local law are probably final and its judgments implicating federal constitutional issues are only subject to this Court's appellate jurisdiction pursuant to 28 U.S.C. § 1257. A federal habeas judge does not exercise appellate jurisdiction over the judgment of another court. Fay v. Noia, 372 U.S. 391, 429-431 (1963). Indeed, a habeas judge lacks power to revise the judgment of a local court, although he has both the power and the duty to act upon the body of the habeas applicant. In discharging this responsibility, the habeas judge may appropriately give deference to the considered judgment of the local court on questions of federal constitutional law but, at bottom, the habeas judge must exercise an independent judgment on such questions. Townsend v. Sain, 372 U.S. 293, 318 (1963). The Court of Appeals went to the heart of the matter when it observed that a claim arising under the Constitution is not a purely local matter. 515 F.2d at 1310, Pet. at 38a. Those who claim the final say for the local courts on matters of federal constitutional law overlook this fundamental point. Brown v. Allen, 344 U.S. 443, 508, 510-513 (1953) (Frankfurter, J., concurring).

Just as it does in the several states, exercise of federal habeas corpus jurisdiction in the District of Columbia requires sensitive accommodation to the respective spheres of judicial authority. That process is already underway. The local court of appeals

Had the Court of Appeals held the other way, startling jurisdictional consequences would have ensued. First, absent the federal courts' habeas corpus jurisdiction, this Court's involvement in constitutional issues arising in the District of Columbia would have been significantly increased,[19] and compelling demands on this Court's "original" habeas corpus jurisdiction would inevitably be made.[20] Second, the federal courts in the District of Columbia would exercise a disruptive pre-trial habeas corpus jurisdiction on application of a local prisoner seeking redress for a

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has announced that it will not disregard a precedent established by the circuit court prior to court reorganization unless it sits en banc to reconsider the point. M.A.P. v. Ryan, 285 A.2d 310 (D.C. App. 1972). Conversely, the Court of Appeals sua sponte heard this case en banc. Left to work out the accommodations necessary to make court reorganization function harmoniously and in accord with the respective jurisdiction which Congress entrusted to each of the judicial participants in the reorganization process, there is no reason to believe -- least of all at this stage -- that appropriate institutional attention will not be given to those few occasions on which the courts may have different constitutional judgments. The time for this Court to consider intervention in the reorganization process, we submit, is the day such a constitutional difference of opinion manifests itself.

19/ In these days of crowded dockets, federal habeas corpus serves a systemic role and presents this Court with the opportunity to avoid what would otherwise be pressing claims to a place on its docket and to await instead the fleshing out of a cloudy factual record, or the informed deliberation of a difficult constitutional issue by the lower federal courts. Absent such a jurisdiction, as this Court has already recognized, a "special responsibility" to resolve disagreements between the local and the federal courts on matters of constitutional law would likely arise. Pernell v. Southall Realty, 416 U.S. 363, 368 n.4 (1974). This would particularly be true in the District of Columbia where the United States Attorney is free to select either a local or a federal criminal charge in many instances, and where he operates free of the leveling effect of the Solicitor General's office in determining whether to prosecute an appeal to the District of Columbia Court of Appeals. See Pet. at 18 n.10, indicating that the United States Attorney prosecuted over half of the appeals to the District of Columbia Court of Appeals in criminal cases raising constitutional questions.

20/ The writ of habeas corpus, unlike the writ of certiorari, is a writ demandable of right. Fay v. Noia, 372 U.S. 391, 435-438 (1963); Brown v. Allen, 344 U.S. 443, 452-457 (1958); id., 344 U.S. at 489-497 (Frankfurter, J., concurring). As petitioners properly conceded below, 515 F.2d at 1302 n.19; Pet. at 16a n.19, this Court's habeas corpus jurisdiction is not solely statutory, and the Court of Appeals has outlined the jurisdictional implications of petitioners' statutory argument on the "original" habeas corpus jurisdiction of this Court. 515 F.2d at 1300-1302; Pet. at 12a-16a.

claimed deprivation of federal constitutional rights.[21] Finally, the careful structuring of the national federal habeas corpus statutes which Congress has painstakenly erected over the years would be frustrated.[22] A decision refusing to attribute to Congress a purpose to create such bizarre jurisdictional consequences is not a likely candidate for further review by this Court.

II

Department of Justice Documents Support the Decision Below

With the consent of the Solicitor General, we have set forth in the appendix documents furnished to us by the Department of Justice after the Court of Appeals handed down its decision in this case, but well before the petition for writ of certiorari was filed

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21/ Even the most literal reading of § 110(g), as petitioners have conceded, affects only the post-conviction habeas corpus jurisdiction of the federal district courts. 515 F.2d at 1306, 1310 n.40; Pet. at 26a-27a, 38a n.40. Habeas corpus jurisdiction, of course, does not require a judgment of conviction as a precondition to its exercise. Detention, not conviction, is all that is needed. Fay v. Noia, 372 U.S. 391, 430 (1968). To be sure, the usual action of a federal habeas judge asked to intervene prior to trial in a local court proceeding is to abstain and require exhaustion of local remedies just as the Court of Appeals required in this case. 515 F.2d at 1313-1314; Pet. at 47a-49a. But abstention is not abdication, and it would be difficult to justify a refusal to act before trial on a jurisdiction which is uncontestably plain if, as petitioners argue, the consequence of that refusal would be an ouster of jurisdiction once the trial had been concluded.

22/ As part of its comprehensive federal habeas corpus legislation, Congress has authorized a federal habeas judge to decline to readjudicate a constitutional issue once determined by a "judge or court of the United States." 28 U.S.C. § 2244. See Sanders v. United States, 373 U.S. 1 (1963); Brown v. Allen, 344 U.S. 443, 508-510 (1953) (Frankfurter, J., concurring). Had the Court of Appeals ruled with petitioners, that legislative assurance of one ruling on a constitutional issue by a "judge or court of the United States" -- a term well understood to refer to the Article III judiciary -- would have been set at naught, and this quite independently of whether the Suspension Clause guarantees a habeas applicant the right to such an adjudication. It is right at this point that those who rely on the federal post-conviction statute, 28 U.S.C. § 2255, founder. Section 2255 fits quite comfortably alongside § 2244, for that statute merely assigns a litigant to one "judge or court of the United States" instead of another. Petitioners' reading of § 110(g), on the other hand, is flatly at odds with the guarantee of § 2244, for Congress was careful to define the Superior Court of the District of Columbia as a "District of Columbia court", not a "federal court" and certainly not a "court of the United States." 11 D.C. Code § 101.

in this Court.[23] We believe those documents furnish additional support for the decision below.

Much of what eventually became the District of Columbia Court Reorganization and Criminal Procedure Act of 1970 originated in a legislative proposal submitted to the Congress by the Department of Justice and transmitted to the Speaker of the House of Representatives on July 11, 1969 by the Attorney General.[24] That same month, Department of Justice personnel engaged in the drafting and submission process prepared a comprehensive working memorandum dealing, inter alia, with § 110. Examination of the working memorandum[25] demonstrates that: (1) the Court of Appeals correctly discerned that the purpose of this section was to fill the statutory gap left by the local court decisions in Burke v. United States, 103 A.2d 347 (D.C. Mun. App. 1954) and Ingols v. District of Columbia, 103 A.2d 879 (D.C. Mun. App. 1954), and to create a statutory post-conviction remedy for the newly created local courts,[26] and (2) that the ex-

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23/ During oral argument before the Court of Appeals, Judge Leventhal asked petitioners' counsel whether § 110 had been proposed by the Department of Justice and, if so, whether Congress had been informed that the sub-section at issue here would have the jurisdictional implications for which petitioners contend. Counsel replied that the statute had indeed been drafted by the Department of Justice, but he was uncertain whether the legislature had been advised of the alleged jurisdictional effects of sub-section (g). After the Court of Appeals handed down its decision, and while the Solicitor General was considering a request to file the present petition, we requested him to authorize us to inspect any documents bearing on Judge Leventhal's question. The Solicitor General kindly arranged for us to do so, and we were furnished the documents set forth in the appendix during September, 1975 by the Department of Justice. By letter dated December 23, 1975, the Solicitor General authorized us to represent to the Court that he has no objection to reproduction of these documents in the appendix to this brief in opposition although he does not "necessarily agree that they have any bearing on the issue before the Supreme Court" in this case.

24/ Hearings on H.R. 13689 et al., before Subcom. No. 1 of the Com. on the Dist. of Col., 91st Cong., 1st Sess. at 4-5 (1969).

25/ The working memorandum is a thick document which contains a section-by-section analysis of the proposed legislation and frequently includes a discussion of the proposed effects of the section at issue or the legal issues raised by the section. We have reproduced pages 33-35 of the original memorandum, the pages which contain the whole discussion of § 110, together with the cover sheet in the Appendix. See infra, pp. 2a-5a.

26/ Compare 515 F.2d at 1306-1307; Pet at. 28a-31a with Appendix, infra, at 2a-5a.

haustion reading put on § 110(g) by the Court of Appeals in this case is exactly the reading given the forerunner of that section by these Department of Justice personnel:

> The only changes are in the court name and in the last paragraph (item 4) which has been altered to make it clear that a habeas corpus motion shall not be entertained in any court unless the prisoner has first filed motion to vacate judgment in the Superior Court of the District of Columbia when that is the appropriate remedy. 27/

Moreover, when the Attorney General transmitted the proposed legislation to the Speaker of the House of Representatives, he included a "summary" of the suggested statute. With respect to § 110, the Attorney General stated:

> Section 23-110 is new. Rather than relying on the inherent power of the Superior Court to review convictions, it applies statutory procedures for post-conviction challenges. It follows 28 U.S.C. 2255 with only the necessary technical changes. 28/

That is the language which was included, in haec verba, in both committee reports as the statute was passed. 29/ Just as important,

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27/ See Appendix, infra, at 4a. Minor changes were made in what eventually became § 110(g), but those changes are irrelevant for present purposes:

1969 Draft	Present § 110(g)
An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief, by motion pursuant to this section shall not be entertained in any court if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.	An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28/ See Appendix, infra, at 13a. The Attorney General's "summary" which accompanied the transmittal letter of July 11, 1969 is a lengthy document. We have reproduced those portions of the summary which speak to the respective jurisdictions of the local and federal courts or which deal with § 110. Those portions, set forth at pages 9a-13a of the Appendix, are sufficient to give the tenor of the comprehensive document and include all references to the section at issue here.

29/ Compare S. Rep. No. 91-405, 91st Cong., 1st Sess. at 38 (1969) and H.R. Rep. No. 91-907, 91st Cong., 2d Sess. at 117 (1970) with the Attorney General's "Summary", infra at 13a. See 515 F.2d at 1306-1307; Pet. at 28a-30a.

however, is the fact that nowhere in the Attorney General's transmittal letter or accompanying summary is there so much as a whisper to the effect that the traditional habeas corpus power of the federal district courts would be affected by enactment of the proposed legislation. Quite the opposite is the flavor of the Attorney General's transmittal letter:

> [The proposed legislation] provides for the gradual transfer of all purely local jurisdiction to the District of Columbia Court System. The transfer would eventually raise the U.S. District Court to the status of a true federal court, unencumbered by the purely local jurisdiction which it alone, among all the federal courts in the country, now exercises. 30/

While we think it would have been quite appropriate for a lower court to have placed heavy reliance on these documents as it turned to the question of statutory construction, we are content at this stage of the proceedings to urge a much more modest use. Surely, the en banc Court of Appeals cannot be faulted for having read § 110(g) as did those involved in the drafting, circulation and transmission to Congress of that very statute. Yet that is exactly what petitioners must do to prevail here, for they have cited not one word in the legislative materials to indicate that Congress read § 110(g) any differently or that it understood the broad jurisdictional implications of the construction advanced by petitioners and chose to confront the constitutional issues which that construction raises. It is equally clear that the Court of Appeals struck precisely the right balance when it left the Department of Justice free to make a deliberate legislative proposal to the Congress and afforded that body an opportunity to consider and debate the policy and constitutional

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30/ See Appendix, infra, at 7a . Although the Attorney General's transmittal letter is printed in the legislative record, Hearings, supra n.24, at 4-5, we have reproduced that letter in the Appendix for the Court's convenience. Solely for the sake of completeness, we have also included in the Appendix the final document furnished to us by the Department of Justice. That document, entitled "Summary of Amendments Relating to Criminal Law and Procedure, May Circulation Draft", does not address the issue involved in this case since the introductory clause "[a]s is the case in federal courts" makes it clear that the reference is to the habeas corpus jurisdiction of the local courts, and not to the federal courts. See Appendix, infra, at 14a-15a.

implications of a straightforward recommendation that the habeas corpus jurisdiction of the district courts be curtailed.

III

The Judgment of the Court of Appeals Is Sustainable on Alternative Grounds

The judgment of the Court of Appeals (Pet. at 53a-54a, 49a) reinstates Palmore's case and directs the District Court to consider the merits of the Fourth Amendment issue. Even on the arguendo assumption that Congress deprived the district courts of the power to issue writs of habeas corpus to those such as Palmore, this judgment would nonetheless have to be sustained for the District Court has jurisdiction over Palmore's case quite apart from 28 U.S.C. §§ 2241 et seq. and power to award relief other than the writ of habeas corpus.

The traditional remedy for testing the lawfulness of an incarceration is the writ of habeas corpus. Fay v. Noia, 372 U.S. 391, 390-400 (1963). The writ, however, is only a judicial remedy, albeit such an important one that it is afforded constitutional status, and a federal judge may only issue the writ in a case "within [his] respective jurisdiction." 28 U.S.C. § 2241(a). Since it is axiomatic that the power to award a particular remedy is sharply to be distinguished from a federal court's jurisdiction over the case before it,[31/] it is not correct to say, as petitioners do, that the District Court is deprived of "jurisdiction" even if it is to withhold a particular remedy. "Jurisdiction", in the sense that petitioners use the term, "means the kinds of issues which give right of entrance to federal courts", Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 671 (1950), and not the power to issue a particular remedy. Avco Corp.

31/ E.g., Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560-561 (1968); Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 671-672 (1950); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-241 (1937); Swift & Co. v. United States, 276 U.S. 311, 331 (1928).

v. Aero Lodge No. 735, 390 U.S. 557, 561 (1968).

The power of a federal district court to issue a writ of habeas corpus when it finds a prisoner held in violation of the Constitution is an exercise of that part of the judicial power which extends to "cases, in law and equity, arising under this Constitution ...." U.S. Const., Art. III, § 2. E.g., Ex parte Royall, 117 U.S. 241, 249 (1886). The federal habeas corpus statutes are not the exclusive repository of such jurisdiction, for the general federal question statute, 28 U.S.C. § 1331, grants original jurisdiction to the district courts over civil actions arising under the Constitution and which involve a matter capable of valuation in excess of ten thousand dollars.[32/] Even on the arguendo assumption that the writ of habeas corpus has been legislatively removed from the arsenal of corrective remedies available to a federal district judge confronted with a claim of unconstitutional confinement, the judgment of the Court of Appeals must be sustained if any judicial remedy was available to Palmore. The obvious alternative remedy is the declaratory judgment followed, if need be, by coercive relief. 28 U.S.C. §§ 2201-2202. That remedy not infrequently serves the same office as the writ of habeas corpus,[33/] and no matter how § 110(g) is read, it

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32/ As the case comes to this Court, Palmore's pleading specifically invokes the jurisdiction of the District Court pursuant to 28 U.S.C. § 1331 in addition to the habeas corpus jurisdiction granted by 28 U.S.C. §§ 2241 et seq. See supra at 2 n.1. That Palmore's case arises directly under the Fourth Amendment cannot seriously be contested; that the six-year restriction on his freedom, including actual incarceration for six months, is capable of valuation in excess of $10,000 is obvious.

33/ E.g., Brownell v. Tom We Shung, 352 U.S. 180 (1956); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955); Hurley v. Reed, 288 F.2d 844 (D.C. Cir. 1961); Rose v. McNamara, 252 F. Supp. 111 (D.D.C. 1966), aff'd 375 F.2d 925 (D.C. Cir. 1967). To be sure, a number of cases say that declaratory relief is not a "substitute" for the writ of habeas corpus, but the courts which have most often repeated that point have been quick to hold the declaratory remedy available when the writ of habeas corpus is not. Compare, e.g., Clark v. Menlo, 174 F.2d 978 (D.C. Cir. 1949) and Forsythe v. Ohio, 333 F.2d 678 (6 Cir. 1964) with Koyce v. United States Board of Parole, 306 F.2d 759 (D.C. Cir. 1962) and Braden v. 30th Judicial District, 454 F.2d 145, 147 n.1 (6 Cir. 1972), rev'd on other grounds, 410 U.S. 484 (1973). See also, Sobell v. Attorney General, 400 F.2d 986 (3 Cir.), cert. denied, 393 U.S. 940 (1968); Note, Habeas Corpus, Custody and Declaratory Judgment, 53 U. Va. L. Rev. 673 (1967).

cannot be construed to affect the federal question jurisdiction of the federal district courts or to curtail the power to award appropriate declaratory and other relief pursuant to 28 U.S.C. §§ 2201-2202.

Finding that Congress had not repealed a portion of the federal habeas corpus jurisdiction, the Court of Appeals had no occasion to reach this alternative jurisdictional ground or to consider the availability of declaratory and other relief in a case such as this. Those issues, squarely posed by Palmore's amended jurisdictional allegations and fully briefed and argued below,[34/] must be decided before the judgment of the Court of Appeals can be overturned. Petitioners make no claim that Congress also repealed by implication portions of 28 U.S.C. §§ 1331, 2201-2202. Such a contention cannot be maintained by reliance on the plain meaning of § 110(g). Accordingly, even were review by this Court warranted on the other points pressed by petitioners, certiorari should nonetheless be denied since the judgment is sustainable on these alternative grounds without regard to the correctness of the reasons which the court below advanced.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

FRANK F. FLEGAL
600 New Jersey Avenue, N. W.
Washington, D. C. 20001

Counsel for Respondent

34/ The Court of Appeals reserved ruling on Palmore's motion for leave to amend the jurisdictional allegations set forth in his petition for writ of habeas corpus until it had considered the briefs and memoranda of the parties and oral arguments of counsel. After argument, but before its opinion was released, the Court of Appeals granted Palmore's motion and an appropriate amendment was thereafter filed in the District Court after the record was returned by the Court of Appeals. Copies of the amended allegations were appropriately served upon the United States Attorney, and an additional copy was furnished to the Solicitor General in September, 1975.

APPENDIX

Additional Statutory Provisions Involved

28 U.S.C. § 1331 provides, in pertinent part:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest or costs, and arises under the Constitution, laws, or treaties of the United States. ***

28 U.S.C. § 2201 provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be r[illegible]wable as such.

28 U.S.C. § 2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. § 2244 provides, in pertinent part:

> (a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.
>
> (b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to a judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ. ***

Lawton

MEMORANDA OF LAW

CRIMINAL PROCEDURE SECTIONS

COURT REORGANIZATION ACT OF 1969

Working Draft
July, 1969

Post Conviction Remedies
§ 402 enacting D.C. Code 23-110

Issue:

Should a provision similar to 28 U.S.C. 2255 be enacted to govern post-conviction remedies in the new court system?

Existing Law:

The District of Columbia courts have inherent power to vacate sentences and grant post conviction relief. Burke v. United States, 103 A. 2d 347 (D.C. Mun. App. 1954) and Ingols v. District of Columbia, _____ A. 2d _____ (D.C. Mun. App. 1954). However there is no statutory provision governing the use of that power by local courts. The Federal Statute on post conviction remedies 28 U.S.C. 2255 does not apply in Local District of Columbia courts. Burke and Ingols, supra.

Proposed Law:

Proposed §23-110 is taken almost verbatim from 28 U.S.C. 2255. §23-110 therefore provides:

(1) A prisoner in custody under sentence of the Supreme Court who claims that his sentence was imposed in violation of the Constitution and courts of the United States or without jurisdiction may move that court to vacate sentence.

(2) The motion may be made at any time.

(3) The court may, after the hearing vacate and set aside the judgment and discharge or resentence or retry the prisoner.

(4) "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief, by motion pursuant to this section shall not be entertained in any court if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

[-3a-]

The only changes are in the court name and in the last paragraph (item 4) which has been altered to make it clear that a habeas corpus motion shall not be entertained in any court unless the prisoner has first filed motion to vacate judgment in the Superior Court of the District of Columbia when that is the appropriate remedy.

Arguments in Favor

There are two basic reasons to including this proposal in the Court Reorganization Act.

First, although the local D.C. Courts have power to entertain motions to vacate, this proposal codifies that power and stipulates the procedure to be followed. This is a useful clarification which should be especially helpful as litigation in the new Superior Court increases. With the increase in felony jurisdiction as proposed by this Act, we may anticipate more challenges in the Superior Court to the commensurately long or felony sentences. The procedure for vacating sentence should be clear both for the purpose of safeguarding the rights of those imprisoned and for the purpose of minimizing unnecessary litigation over procedures.

Second, the bench and bar will be aided by the convenience of uniform procedures in Federal and local courts.

Analysis of Legal Problems:

There appears to be no opposition to this proposal. Although the Federal provision, 28 U.S.C. 2255 was expressly held inapplicable to the local District of Columbia Courts in Burke, supra, that case did not hold that there was any inherent lack of power in the local courts. The federal provision was held inapplicable to the District of Columbia merely because of Congressional intent and strict interpretation of the phrase "a court

[-4-]

established by Act of Congress". Therefore, there is no bar to inclusion of a §2255 provision for post-conviction remedies in the D.C. Code.

[-35-]

Office of the Attorney General
Washington, D. C. 20530

July 11, 1969

The Speaker
House of Representatives
Washington, D. C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and appropriate reference is a legislative proposal to reorganize the court systems in the District of Columbia.

The proposal consists of six titles. Title I is a reenactment and revision of title 11 of the District of Columbia Code, "Organization and Jurisdiction of the Courts." In addition it contains certain interim provisions to protect the rights of persons affected by, and to effectuate the provisions of, the court reorganization. Title II consists of amendments to titles 12 through 17 of the D.C. Code, relating to judicial procedures. For the most part, these are technical amendments necessitated by the court reorganization. Title III consists of amendments to titles 18 through 21 of the D.C. Code, "Decedents Estates and Fiduciary Relations." These amendments also are primarily technical. Title IV contains several amendments to the D.C. penal laws and provides for the amendment, codification and enactment into positive law of title 23 of the D.C. Code, "Criminal Procedure." Title V consists of technical amendments to all other affected provisions of D.C. law. Title VI contains the usual separability provision, a provision that the Act shall become effective six months after enactment, and authority to fill additional judgeships on the D.C. courts prior to the effective date of the Act.

In view of the length and complexity of this proposed legislation, summaries of the various parts of the bill are attached. However, it is pertinent in this letter to call your attention to the most significant aspects of the bill.

The proposed revision of title 11 of the D.C. Code would establish a new Superior Court which would be the trial court of general local jurisdiction in the District of Columbia. In addition to the new jurisdiction conferred upon it, the Superior Court would absorb the jurisdiction presently exercised by the Court of General Sessions, Juvenile Court and D.C. Tax Court. This new Superior Court, together with an expanded District of Columbia Court of Appeals, would constitute the District of Columbia Court System.

It provides for the gradual transfer of all purely local jurisdiction to the District of Columbia Court System. The transfer would eventually raise the U.S. District Court to the status of a true federal court, unencumbered by the purely local jurisdiction which it alone, among all the federal courts in the country, now exercises. This is consistent with the President's directive of January 31, 1969 to draft "appropriate legislation providing for a reorganization and restructuring of our present court system toward the eventual goal of creating one local court of general, civil, criminal and juvenile jurisdiction for the District of Columbia."

In the revision of title 11, other changes have been incorporated to improve the administration of justice in the District. For example, the Superior Court would include a Family Division with broader powers to resolve intra family matters than can now be exercised by either the Juvenile Court or the Domestic Relations Branch of the Court of General Sessions. Specific provisions for the improvement of court management and new provisions substituting a modern Medical Examiner for the old coroner system have been included in the new title 11. Changes in

other portions of title 11, such as the judicial retirement provision, have also been included.

The revisions in titles 12 through 17 of the D.C. Code presently contain no changes in subchapter I, chapter 23 of title 16 of the Code -- Juvenile Proceedings. Not even technical changes have been made in these provisions since the Department of Justice, in cooperation with the Department of Health, Education and Welfare and the District of Columbia Government, is currently revising the law governing juvenile procedures in the District. That revision will be submitted to you as soon as possible.

Section 402 of this bill is the codification of title 23, "Criminal Procedure." The creation of the new court system necessitated changes in existing law and required new procedures for the operation of the courts. It therefore seemed advantageous to codify the entire title.

I urge the prompt enactment of this legislation.

The Bureau of the Budget has advised that this legislation is in accord with the Program of the President.

Sincerely,

Attorney General

SUMMARY OF PROPOSED DISTRICT OF COLUMBIA
COURT REORGANIZATION ACT OF 1969

The proposed District of Columbia Court Reorganization Act of 1969 is a comprehensive bill restructuring the District of Columbia Courts, transferring jurisdiction from the Federal courts in the District to the District of Columbia Courts, revising the District's code of criminal procedure, and making conforming changes throughout the District of Columbia Code. It consists of six titles, described in detail below.

TITLE I

The first title of the bill is comprised of a revision and reenactment of title 11 of the D.C. Code and certain transitional sections relating to the personnel and property of the present D.C. courts.

Section 101, the revision of title 11 of the D.C. Code, would substantially reorganize the court systems in the District of Columbia. It is designed to establish, in gradual stages, federal and local court systems which would be analogous to the systems existing in the States. Thus, the federal courts would ultimately have only federal jurisdiction, with all local jurisdiction vested in the District of Columbia courts. However, the U.S. Attorney and U.S. Marshal would continue to serve both federal and local courts.

The present Court of General Sessions, Juvenile Court and D.C. Tax Court would be consolidated and upgraded into a single Superior Court of expanded jurisdiction which would be the trial court for the District. The present Court of Appeals would continue to hear appeals from the local trial court and would become the highest appellate court for local matters in the District, equivalent to the highest court of a State.

Chapter 1 describes the federal and local courts in the District and equates the D.C. Court of Appeals with the highest court of a State.

Chapter 3 preserves the jurisdiction of the U.S. Court of Appeals for the District of Columbia Circuit over appeals from the D.C. Court of Appeals which are pending or may still be filed on the effective date of the Act or which involve federal misdemeanors tried in the D.C. court. It provides for the continued publication of the U.S. App. D.C. reports for so long as the court retains substantial local appellate jurisdiction.

Chapter 5 preserves the federal jurisdiction of the District Court. It gradually diminishes local civil jurisdiction, some being transferred to the Superior Court on the effective date of the Act, and the remainder in two subsequent stages. Local criminal jurisdiction is also transferred gradually, in two stages.

Provisions relating to employees of the District Court, except the auditor, have been omitted since they are covered by provisions applicable generally to federal courts.

Chapter 7 provides a nine-member D.C. Court of Appeals and continues the provisions for three-judge divisions and in banc hearings. The Court would hear all appeals from the Superior Court, appeals from administrative decisions as provided in the 1968 D.C. Administrative Procedure Act and all appeals from orders and decisions of the D.C. Public Service Commission. The Court would be authorized to hear interlocutory appeals from the Superior Court including orders to suppress evidence. Appeals would also be permitted from rulings on controlling issues of law, made during trial, in both civil and criminal cases.

Judges of the Court of Appeals could be assigned to Superior Court and Superior Court judges could be assigned

to the Court of Appeals when necessary. The Chief Judge would be authorized to designate the judge who would act in his stead. Judicial salaries would be equated with level III of the Federal Executive scale -- $2500 below judges of federal appellate courts.

The Court of Appeals could make its own rules of procedure, and would approve the general civil and criminal rules of the trial court.

Chapter 9 consolidates the District of Columbia Court of General Sessions, Juvenile Court and Tax Court into a single Superior Court. The Court would consist initially of 37 judges -- an increase of 10 over the total number of judges of the three courts. The number of judges would subsequently be increased in stages to a total number tentatively proposed as fifty judges. The Superior Court would ultimately be divided into four divisions -- civil, criminal, family and probate. Judicial salaries would be equated with level IV of the Federal Executive scale -- equal to the U.S. Attorney and $2000 below federal trial judges.

The Chief Judge would be empowered to rotate judges among the divisions and would be authorized to designate the judge who acts in his stead.

The civil jurisdiction of the court would be increased on the effective date (six months after enactment) to cover all personal injury actions of a purely local nature and all other local civil and equity cases where the amount in controversy is $50,000 or less. Other transfers on the effective date include D.C. land condemnation, real property actions, quo warranto actions against D.C officials and corporations, habeas corpus against all but federal officials, and commensurate equity jurisdiction. Additional jurisdiction would be transferred in two further stages. The second stage (eighteen months after the first, i.e. two years after enactment) includes probate jurisdiction, hospitalization

[3]

of the mentally ill, and various actions relating to the property and estates of individuals. The third stage (two and one-half years after the first, i.e. three years after enactment) would vest all other non-federal jurisdiction.

Criminal jurisdiction would be transferred in two stages. The first stage (six months after enactment) includes all D.C. felonies except certain enumerated crimes punishable by 15 years or more imprisonment. The second stage (two years after enactment) includes all remaining D.C. felonies. The federal court would retain jurisdiction to try any D.C. felonies joined in the same indictment with federal felonies. The Superior Court would continue to hold preliminary hearings in federal criminal cases until the second stage of jurisdictional transfer. When all local jurisdiction is transferred to Superior Court, all federal jurisdiction would revert to the District Court.

[4]

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Title IV

The fourth title of the bill amends the criminal law provisions of the District of Columbia code, particularly criminal procedure, to take into account the court reorganization. Some new provisions were required to replace the Federal Rules of Criminal Procedure presently governing local felony cases tried in the U.S. District Court and old provisions were revised to bring them up to date. Since this resulted in changes throughout the present title 23 of the Code, the title as a whole would be enacted into positive law.

[13]

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Section 402 is the codification of title 23 of the D.C. Code "Criminal Procedure". Most of the present uncodified title is merely repeated without substantial change, and many of the amendments would merely apply provisions of the Federal Rules to cases in the Superior Court.

In Chapter 1, the following provisions would alter prior statutory law:

Section 23-101(d) and (e) provides for joining offenses prosecuted by the United States and the District of Columbia in a single indictment or information, or for trial.

Section 23-103, modeled on Federal Rule 32(a)(1), provides that both defendant and prosecutor shall be allowed to address the court on sentence before it is imposed.

[14]

Section . -104 clarifies the present statute on appeals by the Government. Subsection (a) is prior law except for a provision, taken from Federal Rule 41(e), requiring motions to suppress evidence to be made before trial. Subsection (b) implements this requirement by allowing interlocutory Government appeal from the suppression of evidence during trial. Subsection (c) clarifies prior law on the Government's right to appeal from orders dismissing criminal charges. Subsection (d) allows the Government to appeal any other ruling made during a trial which

[14]

involves a substantial and recurring question of law. The trial court may allow an interlocutory appeal, or the appeal may be taken after trial. This provision also seeks to clarify and to mandate the intent of Congress in present law, D.C. Code § 23-105, to allow Government appeals after acquittal of the defendant.

Section 23-105 adds provisions from the Federal Rules to present §§23-107 and 108 on challenges to jurors. It expressly provides for equal numbers of challenges for prosecution and defense, a principle implied in present law.

Section 23-106 substitutes Federal Rule 17(b) for present D.C. Code § 23-109, on defense witnesses, a change only in language.

Section 23-107 clarifies present D.C. Code § 23-110 on procedures for obtaining the testimony of jointly charged defendants either for each other or for the Government.

Section 23-108 changes present D.C. Code §§ 23-111 and 112 on depositions of defense witnesses by allowing the prosecutor to object to a deposition and by eliminating an archaic preference for depositions on written interrogatories.

Section 23-110 is new. Rather than relying on the inherent power of the Superior Court to review convictions, it applies statutory procedures for post-conviction challenges. It follows 28 U.S.C. 2255 with only the necessary technical changes.

Section 23-111 which is new, establishes uniform procedures for determining whether a person convicted of crime is subject to an increased penalty because of his prior convictions (e.g., sections 401(1) and (2), discussed above; D.C.

-13a-

[15]

-13a-

May Circulation Draft

SUMMARY OF AMENDMENTS RELATING TO CRIMINAL LAW AND PROCEDURE

The amendments to the District of Columbia laws relating to criminal law and procedure reflect the proposed transfer of criminal jurisdiction. Several substantive changes have been included to fill gaps now existing in the law and to provide certain procedures in District of Columbia courts which now exist in the federal courts in the District. Since many of these new provisions would be in the law relating to criminal procedure, it was considered an advantageous time to codify title 23 of the D.C. Code and enact it into positive law. This is done in section 402 of the proposed legislation.

Section 401 consists of three amendments to the D.C. penal laws. The first is an amendment to the provision for added penalty for repeat offenders (D.C. Code § 22-104) which is utilized primarily in misdemeanor cases. It makes clear that the same offense committed in other jurisdictions will be considered a prior offense for purposes of D.C. law. It assures the defendant a trial on the issue of prior record if he contests it, and permits the prosecutor to raise the issue of prior record within six months after sentencing if he does not discover it until then.

A new provision for additional penalties for persistent felony offenders would be added. It is modeled on the New York law and would authorize an indeterminate sentence up to life for a third felony offender. Again, the defendant would be entitled to a trial on the issue of prior record and the prosecutor would be permitted to raise the issue within six months after sentencing if he did not discover it until then.

A conspiracy provision would be added to D.C law. It is modeled on the New York provision, rather than the federal law, because of the necessity of greater specificity in a conspiracy provision applicable to a

-14a-

geographically limited area. The penalty for conspiracy would be the maximum penalty for the offense which is the subject of the conspiracy, or 5 years and/or $10,000, whichever is less. Proof of an overt act would be required.

Section 402 of the proposed legislation is the codification of title 23 -- "Criminal Procedure."

Chapter 1 consists of general provisions relating to prosecution, trial and sentencing. Much of it is existing law, modified to recognize the felony jurisdiction of Superior Court. However, the following changes have been included. Section 23-101 expressly authorizes joinder of municipal ordinance violations and offenses in violation of statutory provisions. Section 23-103, modeled on the federal rule, states the defendant's right of allocution, and expressly provides that the prosecutor, in his discretion, may recommend as to sentence. Section 23-104 restates existing law on appeal by the government, but adds a provision for retrial of the defendant if there was error in a ruling against the government sufficient to justify a mistrial. Section 23-105 clarifies the provision on challenges to jurors, permits challenges to be exercised jointly or separately in cases of multiple defendants, allows the prosecution the same number of challenges as the defense in all cases, permits additional challenges when alternate jurors are used, and permits the setting aside of a verdict if a cause for juror disqualification is later discovered.

Section 23-108 simplifies the existing provision on the taking of depositions of defense witnesses and adds the requirement of prosecutorial consent when a deposition is to be used.

Section 23-110 is a new provision, paralleling 28 U.S.C. 2255, and requiring that a prisoner challenging his conviction or sentence do so in the convicting court. As is the case in federal courts, habeas corpus would be barred unless the statutory remedy is inadequate or ineffective.

[2]

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No. 75-811

Supreme Court, U. S.
FILED
JUN 16 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

ROOSEVELT F. PALMORE

C. L. SWAIN, SUPERINTENDENT, LORTON REFORMATORY, PETITIONER

v.

JASPER C. PRESSLEY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-811

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

ROOSEVELT F. PALMORE

C. L. SWAIN, SUPERINTENDENT, LORTON REFORMATORY, PETITIONER

v.

JASPER C. PRESSLEY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in *Palmore* v. *Superior Court of the District of Columbia, et al.* (Pet. App. A) is reported at 515 F.2d 1294. The

opinion of the court of appeals in *Pressley* v. *Swain* (Pet. App. D) is reported at 515 F.2d 1290. The opinion and orders of the district courts (Pet. Apps. C, F, and G) are unreported.

JURISDICTION

The *en banc* judgments of the court of appeals in *Palmore* (Pet. App. B) and in *Pressley* (Pet. App. E) were entered on July 9, 1975. On October 9 and 29, 1975, the Chief Justice granted extensions of time for filing a petition for writs of certiorari to and including December 6, 1975. The petition was filed on December 5, 1975, and was granted on February 23, 1976 (A. 116). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States District Courts have jurisdiction to entertain post-conviction applications for writs of habeas corpus on behalf of persons seeking release from custody under criminal sentences imposed by the Superior Court of the District of Columbia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

23 D.C. Code 110(g) provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears

> that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

The comparable portion of 28 U.S.C. 2255 provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Other relevant constitutional and statutory provisions are set forth in Addendum B to this brief, *infra*, pp. 21a-30a.

STATEMENT

1. *Palmore* v. *Superior Court.*

After a non-jury trial in the Superior Court of the District of Columbia, respondent Palmore was convicted on March 31, 1971, of violating the felony provision of 22 D.C. Code 3204 by carrying a pistol without a license after previously having been convicted of a felony.[1] On April 27, 1971, he was sen-

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[1] As set out in this Court's opinion in *Palmore* v. *United States*, 411 U.S. 389, the facts giving rise to this conviction are as follows: In January 1971, two officers of the District

tenced to a term of imprisonment for two to six years. Execution of all but six months of the sentence was suspended, and respondent was placed on probation for six years.

Prior to trial, Palmore moved to dismiss the indictment on the ground that the Superior Court lacked jurisdiction to try him for a felony, alleging that only Article III judges with life tenure and salary protection could constitutionally exercise jurisdiction over the trial of a felony based on a law passed by Congress. He also moved to suppress the pistol seized from the car he was driving when stopped by the police, on the ground that the gun was discovered as the result of an unlawful search. The motions were denied, and Palmore was convicted. On appeal, the District of Columbia Court of Appeals rejected these claims and affirmed his conviction. *Palmore* v. *United States*, 290 A. 2d 573 (D.C. App.). Respondent then appealed to this Court pursuant to 28 U.S.C. 1257(2).

This Court concluded that since the District of Columbia "is constitutionally distinct from the States"

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of Columbia Metropolitan Police Department observed a moving automobile with license tags indicating that the vehicle was rented. The officers stopped the vehicle for a spot-check of the driver's license and car-rental agreement. Respondent Palmore, the driver of the vehicle, produced a rental agreement from the glove compartment of the car and explained why the car appeared to be, but was not, overdue. Meanwhile, one of the officers observed the hammer mechanism of a gun protruding from under the armrest in the front seat of the vehicle. Respondent was thereupon arrested and the gun seized.

(*Palmore* v. *United States*, 411 U.S. 389, 395), an appeal could not be taken under Section 1257(2). However, the Court treated Palmore's jurisdictional statement as a petition for a writ of certiorari and granted the petition, limited to the question whether Palmore was required to be tried by a court ordained and established in accordance with Article III, Section 1, of the Constitution (411 U.S. at 396-397). On that question, the Court held that "there is no support * * * in either constitutional text or in constitutional history and practice" for the view that criminal offenses under laws passed by Congress may not be prosecuted except in courts established pursuant to Article III (411 U.S. at 400).

Thereafter, on May 15, 1973, Palmore filed an application for a writ of habeas corpus in the United States District Court for the District of Columbia, naming as respondents the Superior Court of the District of Columbia, the Attorney General of the United States, and the Director of the District of Columbia Department of Corrections (A. 3-7).[2] The application raised the same Fourth Amendment claim that Palmore had pursued on direct appeal to the District of Columbia Court of Appeals.

On July 10, 1974, the district court dismissed the petition on the ground that Congress, by enacting 23 D.C. Code 110, had deprived it of jurisdiction (Pet. App. 55a-56a). The court relied upon the provision in 23 D.C. Code 110(a) that post-conviction collateral

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[2] Then, as now, respondent was on bond pending appeal.

attacks against convictions of the Superior Court of the District of Columbia may be made by motion in that court, and upon the express provision of Section 110(g) that an application for a writ of habeas corpus "shall not be entertained by * * * any Federal or State court if it appears that the applicant has failed to make a motion for relief under [Section 110] or that the Superior Court has denied him relief * * *."[3]

Palmore appealed to the United States Court of Appeals for the District of Columbia Circuit, contending (1) that Congress did not intend 23 D.C. Code 110(g) to bar the United States District Court from entertaining collateral attacks against convictions obtained in the Superior Court, and (2) that if Section 110(g) imposes such a jurisdictional limitation, it violates the Suspension Clause of the Constitution (Article I, Section 9, Clause 2) and is contrary to equal protection principles embodied in the Due Process Clause of the Fifth Amendment. These

[3] The district court also noted (Pet. App. 56a) that Palmore was "authorized by Title 23, D.C. Code § 110(a) to apply for relief by motion but has failed to do so" and that "there is no showing that the Superior Court has denied him relief or that the remedy by motion is inadequate and ineffective to test the legality of his detention * * *."

Accordingly, the district court found it unnecessary to reach the government's additional contention (A. 39-40), based upon Mr. Justice Powell's concurring opinion in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250-275, that claims predicated upon allegedly erroneous denials of motions to suppress evidence seized in violation of the Fourth Amendment should not be cognizable on collateral attack. That question is now pending before this Court in *Wolff* v. *Rice*, No. 74-1222, and *Stone* v. *Powell*, No. 74-1055.

contentions were based on the premise that persons convicted under a criminal statute passed by Congress are constitutionally entitled to collateral review of their convictions by Article III judges.

Over the dissent of one judge, the court of appeals, sitting *en banc*, reversed the judgment of the district court and remanded the case to that court for a decision on the merits of Palmore's Fourth Amendment claims (Pet. App. 1a-52a).

2. *Pressley* v. *Swain*.

Following a jury trial in the Superior Court of the District of Columbia, respondent Pressley was convicted on April 22, 1971, of grand larceny, in violation of 22 D.C. Code 2201, and of larceny from the District of Columbia government, in violation of 22 D.C. Code 2206. On October 1, 1971, he was sentenced to concurrent prison terms of 32 to 96 months on the grand larceny conviction and 20 to 60 months on the conviction for larceny from the District of Columbia government. On appeal, Pressley contended that inconsistencies between the testimony of two government witnesses concerning the physical appearance of the typewriter he was alleged to have stolen reflected perjury by one of them. On May 22, 1972, the District of Columbia Court of Appeals affirmed his conviction in an unpublished order, stating that "the record discloses no error affecting the substantial rights of appellant" (A. 109).

On June 5, 1972, Pressley filed an untimely *pro se* motion for a new trial in the Superior Court, claim-

ing ineffective assistance of counsel because his attorney had failed to move for suppression of the typewriter respondent allegedly had stolen. The court denied the motion. On March 2, 1973, the District of Columbia Court of Appeals, setting forth its reasons in some detail, affirmed the Superior Court's order denying the motion (A. 111-112).[4]

During the pendency of the appeal, Pressley filed a second *pro se* motion in the Superior Court, seeking to compel production of the grand jury voting records in his case. The trial court denied the motion on the ground that it lacked jurisdiction. On July 6, 1973, the District of Columbia Court of Appeals affirmed the Superior Court's denial of the motion, not on the jurisdictional ground on which the Superior Court had relied, but on the merits (A. 114-115).[5]

On May 11, 1973, Pressley, who was then serving his sentence at the Lorton Reformatory in Lorton, Virginia, filed a *pro se* petition for a writ of habeas

[4] Pressley's argument on appeal, as summarized by the Court of Appeals, was that "a suppression motion 'could have been based upon lack of probable cause for issuance of a search warrant and on improper execution of said warrant' because (1) the affidavit in support of the warrant was based upon information supplied by an informant whose credibility and reliability did not meet the test set forth in *Aguilar* v. *Texas*, 378 U.S. 114 (1963), and (2) the serial number of the typewriter seized differed from the serial number contained in the affidavit in support of the search warrant" (A. 111-112).

[5] Each of Pressley's three appeals to the District of Columbia Court of Appeals was fully briefed and argued by appointed counsel.

corpus under 28 U.S.C. 2241, *et seq.*, in the United States District Court for the District of Columbia (A. 62-69).[6] The petition was directed against C. L. Swain, the Superintendent of the Lorton Reformatory,[7] and alleged that Pressley had been denied the effective assistance of counsel guaranteed by the Sixth Amendment.[8] After a hearing on the question

[6] Respondent was released from confinement and placed on parole on January 1, 1974. His parole is due to expire on April 21, 1979.

[7] Neither the United States nor the Attorney General was named as a party. However, by long-standing agreement, when the complaint in a habeas corpus petition relates to the validity of an underlying conviction secured by the United States, the United States Attorney for the District of Columbia represents the Lorton Reformatory, or the District of Columbia Department of Corrections, or, as in the *Palmore* case, the Superior Court of the District of Columbia. Otherwise the respondents are represented by the Corporation Counsel for the District of Columbia. Accordingly, while the initial response to Pressley's habeas corpus petition was filed by the Office of the Corporation Counsel, all subsequent pleadings on behalf of Superintendent Swain were prepared and filed by the United States Attorney's Office.

[8] Pressley's Sixth Amendment claim raised issues in addition to that raised in his first motion for a new trial in the Superior Court (see note 4, *supra*). He alleged that he was denied the effective assistance of counsel because his trial counsel had failed (1) to move to suppress the typewriter allegedly stolen by respondent, (2) to introduce expert testimony regarding the value of the typewriter at the time of the theft, (3) to arrange for a fingerprint expert to determine whether fingerprints could have been taken from the typewriter, (4) to object on *voir dire* when a prospective juror rose in open court and stated that she had seen petitioner on a previous occasion, (5) to object to the indictment when it appeared on the face of two separate indictments that the

of the court's jurisdiction to entertain the petition, the district court entered an order dismissing the petition for want of jurisdiction "by virtue of 23 D.C. Code § 110(g)" (Pet. App. 66a). Pressley appealed.

On October 30, 1974, the United States Court of Appeals for the District of Columbia Circuit, *sua sponte*, remanded the record to the district court to clarify its order of dismissal (see Pet. App. 59a).[9] The district court thereafter "respectfully advise[d] that on the papers then before it, it appeared that appellant had not adequately exhausted his remedies in the local court system. The Court made no determination as to the constitutionality of 23 D.C. Code § 110" (Pet. App. 67a). The district court concluded only that "[i]t was not apparent that the suppression issue had ever been analyzed and there were aspects of the adequacy of counsel not passed upon at the local level. The writ should have been initially filed in the local courts" (*id.* at 68a-69a). The district

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signatures of the United States Attorney for the District of Columbia were patently different, and (6) to make an effort to impeach a witness whose testimony regarding the presence of spray paint on the typewriter was allegedly in conflict with the testimony of other government witnesses (A. 64-67).

[9] The court of appeals instructed the district judge to "indicate whether, in ruling that he was without jurisdiction to entertain the petition for a writ of habeas corpus under 23 D.C. Code § 110(g), he considered the applicant as one who had exhausted his remedies in the local court system, or whether he ruled only that he was without jurisdiction because the applicant had not first sought a writ of habeas corpus in Superior Court as required by 16 D.C. Code § 1901 (c) and 23 D.C. Code § 110(a)" (Pet. App. 59a).

court "did not feel the question of the ultimate effect of 23 D.C. Code § 110 upon the viability of a further writ of habeas corpus in the District Court was ripe for decision in this case" (*id.* at 69a).

The court of appeals, again sitting *en banc* and again over the dissent of one judge, reversed the judgment of the district court and remanded the case for a decision on the merits of Pressley's Sixth Amendment claims (Pet. App. 57a-63a).

3. The Court of Appeals' Opinions.

a. *Palmore.* The court of appeals held in *Palmore* that 23 D.C. Code 110(g) "is merely an exhaustion of remedies requirement" (Pet. App. 5a) that ordinarily compels initial submission of post-conviction claims to the local courts but does not otherwise restrict the availability of "post-conviction relief in the United States District Court for the District of Columbia for an individual convicted in Superior Court" (*id.* at 4a).

Invoking the maxim that "statutes should be interpreted to avoid difficult constitutional questions" (*id.* at 5a), the majority concluded that the interpretation suggested by "the face of the statute" would "force us directly to confront serious and significant constitutional questions" (*ibid.*)—namely, "whether section 110(g) constitutes an improper suspension of the Great Writ and whether by singling out those convicted of local District of Columbia crimes for eliminating access to the article III courts Congress has violated the concept of equal protection of law"

(*id.* at 14a). Unwilling to resolve "these questions of first impression" without assurance that "Congress clearly intended the construction which raises" them (*id.* at 27a), and unwilling to infer such intent from the language of Section 110(g) itself, the court "reject[ed] the Government's 'clear meaning' approach" (*id.* at 22a) and inquired "beyond the face of the statute to its legislative history" (*id.* at 5a).

The majority's analysis of the legislative history was predicated upon its view that "[a]cceptance of the Government's construction would result in significant changes in habeas corpus jurisdiction traditionally exercised by the [Article III] federal courts" (*ibid.*). The court therefore framed the question as whether the legislative history reflected an awareness on the part of Congress "of section 110's considerable jurisdictional impact or its possible unconstitutionality" (*id.* at 38a). Finding "no debate or discussion" (*ibid.*) reflecting such an awareness, the court concluded that "[t]he most logical inference which may be drawn from this silence is that Congress never intended section 110 to affect the district court's jurisdiction" (*id.* at 41a).

Section 110 was designed, in the court of appeals' view, merely to provide "a statutory remedy for post-conviction relief in the new court system" (*id.* at 30a) so that the local courts would no longer need "to rely * * * upon their inherent authority" to entertain motions for post-conviction relief (*ibid.*). Perceiving the resulting statute as no more than a codification of the local courts' pre-existing "common law power"

(*ibid.*), the court of appeals could find no basis for inferring that Congress meant simultaneously to restrict the habeas jurisdiction of the Article III federal courts.

The majority believed that its analysis was consistent with the broad purpose of the Court Reform Act to establish "a dual court system analogous to the relationship between the federal and state courts" (*id.* at 33a). "The interpretation of section 110 most harmonious with this federal-state analogy," according to the court, is one that "would allow the district court to entertain petitions for collateral review in the same manner as district courts do for the fifty states" (*id.* at 35a).

Finally, applying its exhaustion-of-remedies construction of Section 110(g) to the facts in *Palmore*, the court ruled that, since Palmore had tendered his Fourth Amendment claim to the Superior Court in a pre-trial motion to suppress and to the District of Columbia Court of Appeals on direct appeal, and since "those courts fully considered and rejected the claim," Palmore had "sufficiently exhausted his local remedies despite not having made a motion [in the Superior Court] under section 110" (*id.* at 47a).

Judge Robb dissented. Since, in his view, the statute's "plain language means exactly what it says"—namely, that the United States District Courts are precluded from entertaining motions for post-conviction relief on behalf of persons in custody under Superior Court sentences even if remedies in the local court system have been exhausted—Judge Robb "re-

ject[ed] the premise upon which the majority avoids what it considers to be difficult constitutional questions" (*id.* at 49a). Turning to those questions, Judge Robb concluded that the statute violates neither the Suspension Clause nor the equal protection principles of the Fifth Amendment's Due Process Clause.

First, since "the relief available in the Superior Court under 23 D.C. Code § 110 * * * is the equivalent of that available in a federal court under 28 U.S.C. § 2255," and since "the Supreme Court has held that the scope of 28 U.S.C. § 2255 is 'exactly commensurate' with the scope of federal habeas corpus," it followed, in Judge Robb's view, that "[t]he relief defined in section 110 * * * is the equivalent of federal habeas corpus relief" (Pet. App. 50a). The Suspension Clause question therefore "is reduced to the difference in the tenure and salary protections accorded District Court and Superior Court judges" (*ibid.*). That question Judge Robb found answered in principle by this Court's decision in the first *Palmore* case. "If without the dilution of his constitutional rights a man may be tried and sentenced to the penitentiary by an Article I judge of the Superior Court, I see no reason why he may not be limited to that same court when applying for collateral post-conviction relief" (*id.* at 51a).

On the equal protection issue, Judge Robb concluded in a similar vein that, if "there is no invidious discrimination when a person in the District of Columbia is tried in an Article I court for a

violation of an act of Congress, applicable only within the District," then "it is not a denial of equal protection when that person is required to present his application for collateral relief to an Article I District of Columbia court" (*id.* at 51a-52a).

b. *Pressley.* The court of appeals in *Pressley* relied on its holding in *Palmore* that Section 110 (g) "operates only as an exhaustion of remedies provision" (Pet. App. 61a). It held that Pressley had "exhausted his local remedies by first pursuing his claim through a motion under section 110" (*id.* at 62a) and that he was therefore entitled to an adjudication of the constitutional claims presented in his habeas corpus petition in the district court.[10]

Judge Robb dissented for the reasons stated in his dissenting opinion in *Palmore* (*id.* at 63a).

SUMMARY OF ARGUMENT

It is our submission that the district court lacks jurisdiction to entertain respondents' applications for writs of habeas corpus. In part I of this brief, we show that the language and legislative history of 23 D.C. Code 110 compel the conclusion that, except in extraordinary circumstances not present here, the statute prohibits federal district courts from enter-

[10] Because of the importance of the statutory issue in this case, we did not present in our petition for a writ of certiorari the essentially factual question whether, assuming exhaustion is all that Section 110(g) requires, Pressley's motions in the Superior Court adequately exhausted his remedies in that court with respect to all the claims raised in his petition for a writ of habeas corpus.

taining collateral attacks upon Superior Court sentences. In part II, we address the constitutional questions that the court of appeals declined to resolve. We show that Section 110 neither suspends the privilege of the writ of habeas corpus nor denies to persons convicted in the Superior Court of the District of Columbia the equal protection of the laws.

I

Congress enacted the District of Columbia Court Reform and Criminal Procedure Act of 1970 in response to the mounting crime rate in the District of Columbia, in order to provide swifter and surer justice by eliminating the backlog of cases in the United States District Court. Exercising its powers under Article I of the Constitution, Congress established a new local court system composed of a trial court of general jurisdiction (the Superior Court of the District of Columbia) and an appellate court (the District of Columbia Court of Appeals). The Act transferred jurisdiction over all exclusively local matters—including all criminal prosecutions under the District of Columbia Code—from the United States District Court to the Superior Court. Congress anticipated that both the enlarged and upgraded local court system and the significantly less burdened Article III court system would as a result of the reforms be equipped to administer prompt criminal justice in the cases within their respective jurisdictions. In *Palmore* v. *United States*, 411 U.S. 389, this Court upheld the constitutionality of the Article I court system, concluding that "Congress

was not required to provide an Art. III court for the trial of criminal cases arising under its laws applicable only within the District of Columbia" (411 U.S. at 410).

At issue in this case is the meaning of one subsection of the Court Reform Act. Congress provided in 23 D.C. Code 110(a) that a person convicted of a criminal offense in the Superior Court may challenge his conviction collaterally by filing a motion in the Superior Court to vacate, set aside, or correct his sentence. Section 110(g)—the provision in question here—specifies that an application for a writ of habeas corpus on behalf of a prisoner authorized to apply for relief by motion under Section 110(a) "shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief * * *."

The court of appeals held that this is merely an exhaustion of remedies provision, requiring prisoners to seek relief initially in the Superior Court but not otherwise affecting the habeas corpus jurisdiction of the United States District Courts. That interpretation, we submit, cannot be squared with either the language or the legislative history of Section 110(g).

1. The language is unambiguous. It deprives the United States District Courts of jurisdiction to entertain a post-conviction application for a writ of habeas corpus regardless of whether the applicant

has already exhausted his Superior Court remedy. The prohibition applies if it appears *either* (1) "that the applicant has failed to make a motion" under Section 110 *or* (2) "that the Superior Court has denied him relief." By concluding that Section 110(g) is merely an exhaustion of remedies provision, the court of appeals gave effect only to the first clause. The court attributed no meaning whatever to the second clause; it simply read that clause out of the statute.

2. The court thought it was appropriate to take that extraordinary step in order to avoid resolving the serious constitutional questions that it believed would be presented if the statutory language were given effect. Although this Court's decisions reflect a preference for construing a statute, if "fairly possible" (*Crowell* v. *Benson*, 285 U.S. 22, 62), to avoid a serious constitutional question, the principle applies only "in the choice of fair alternatives" (*United States* v. *Rumely*, 345 U.S. 41, 45) and "does not authorize a departure from clear meaning" (*Jay* v. *Boyd*, 351 U.S. 345, 357, n. 21). In order for judicial nullification of the second clause of Section 110(g) to be viewed as a "fair alternative" to giving effect to the clause, the legislative history would have to reveal a Congressional purpose so plainly at variance with the words of the statute that to give meaning to those words would obviously negate the will of Congress. Mere silence in the legislative history could not justify a refusal to give effect to a portion of the Congressional enactment that is plain in its meaning, that is not inconsistent with other provisions of the legislation or with the purposes of the legislation, and that does not produce an absurd result.

3. Far from justifying the court of appeals' nullification of the statutory clause, the legislative history confirms that Congress meant precisely what it said in Section 110(g). Congress sought in the Court Reform Act to liberate the Article III court system from the crippling burdens of administering local criminal justice in cases involving D.C. Code offenses, so that it could devote its resources to achieving swift and sure justice in cases arising under nationally applicable criminal laws. The solution was to provide for a "total transfer" of local criminal justice responsibilities from the Article III courts to the newly created Article I court system. By directing all post-conviction attacks on Superior Court sentences exclusively to the Superior Court itself, Section 110 serves the important function of insulating the Article III court system from the drain on its resources that would result from a collateral involvement in the local criminal litigation that the Act assigned to the Article I court system.

The language of Section 110, including subsection (g), is almost identical to that of 28 U.S.C. 2255, and the legislative history of Section 110 reveals that the resemblance was intentional. It is therefore significant that Section 2255—which provides that collateral attacks on sentences imposed by Article III courts and Article I territorial courts

must be brought by motion in the sentencing court—has never been viewed as merely an exhaustion of remedies provision but rather has been seen as providing the exclusive post-conviction remedy for prisoners authorized to invoke it. Indeed, as if to emphasize its parallel intention in Section 110(g), Congress added a phrase to the transplanted language of Section 2255, specifying in Section 110(g) that applications for writs of habeas corpus on behalf of persons authorized to seek relief by motion in the Superior Court "shall not be entertained *by the Superior Court or by any Federal or State court*" (emphasis added).

The court of appeals thought that if Congress had understood the provisions of Section 110 to preclude Superior Court convicts from access to an Article III tribunal for post-conviction relief, the measure would have provoked "considerable debate and controversy" (Pet. App. 38a); the court inferred from the absence of such debate that Congress must not have meant what it said in the statute. But Section 110 simply adopted the familiar language of 28 U.S.C. 2255 and made the post-conviction procedures of that statute applicable to the new local court system. Since Section 2255 itself prohibits Article III district courts from entertaining post-conviction habeas corpus applications on behalf of persons convicted in the Article I territorial courts, and since no court had held that aspect of Section 2255 unconstitutional, there is no reason

to suppose that Congress would have perceived the parallel provisions of Section 110 as raising controversial questions of policy or constitutionality.

II

Section 110 neither suspends the privilege of the writ of habeas corpus nor denies to Superior Court convicts the equal protection of the laws.

1. The post-conviction remedy provided by Section 110 is exactly commensurate, in terms of the nature and scope of the available relief, with the writ of habeas corpus. Respondents' Suspension Clause argument rests, therefore, on the premise that the privilege of the writ of habeas corpus is suspended if a person may not apply for the writ to a judge having the tenure and salary protections afforded by Article III of the Constitution. But nothing in the text of the Constitution or in the decisions of this Court supports the contention that Congress must provide an Article III forum for the adjudication of post-conviction collateral challenges to sentences imposed by a federally constituted court established pursuant to Article I.

On the contrary, the constitutional history reveals that the Suspension Clause was intended to prohibit a complete denial of any judicial remedy to test the legality of detention. The framers left to Congress the authority to prescribe the procedures for issuance of the writ and to determine what judicial tribunals would be empowered to entertain applications for the writ.

Congress chose here to confine applications for habeas-type post-conviction relief to the Superior Court, in which the sentence was imposed. There is no reason to assume that the judges of the Superior Court, appointed by the President and confirmed by the Senate, with 15-year terms and salaries keyed to those of United States District Judges, are institutionally less able or less likely than are Article III judges to give full and fair consideration to federal constitutional claims.

Moreover, the history of the Constitution demonstrates that the framers did not understand the privilege of the writ of habeas corpus to extend to collateral attacks on criminal convictions entered by courts of competent jurisdiction. Congress could, therefore, abolish post-conviction federal habeas corpus procedures without violating the Suspension Clause. Certainly Section 110—which merely directs such post-conviction challenges to the Article I sentencing court without restricting at all the scope of the available remedy—does not amount to a suspension of the privilege of the writ within the meaning of the constitutional prohibition.

2. Respondents' equal protection argument, like their Suspension Clause argument, is founded on the tenure and salary differences between Article III and Article I federal judges. But the guarantee of equal protection does not encompass a right to litigate claims in any particular court, so long as equal laws prevail in the available tribunals. The different constitutional status of the Superior Court and the

United States District Courts affects neither the scope of the available post-conviction remedy nor the source of the applicable law.

All persons convicted in an Article III or an Article I federal court have the same post-conviction remedy by motion in the court that imposed the sentence. Persons convicted in a state court have a similar post-conviction remedy in an appropriate federal district court. That state prisoners have access to an Article III tribunal, while Superior Court and territorial court convicts do not, simply reflects a permissible Congressional judgment that federal control over the Article I courts and over the nature and scope of the post-conviction remedy available in those courts makes it unnecessary to duplicate for District of Columbia and territorial convicts the system of federal post-conviction review already provided in the sentencing court. Since Congress has provided only one avenue of post-conviction relief in the federal courts for all other categories of prisoners, equal protection concepts do not require it to provide two for D.C. Code violators.

Finally, even if Section 110 can be said to disfavor Superior Court convicts, the classification is a reasonable means to the important ends of preserving the capacity of the federal district court to administer prompt criminal justice in cases arising under the nationally applicable laws of Congress and promoting the finality of federal judgments by avoiding the duplication of federal post-conviction remedies.

ARGUMENT

I

UNDER 23 D.C. CODE 110, THE DISTRICT COURT IS PROHIBITED FROM ENTERTAINING RESPONDENTS' POST-CONVICTION APPLICATIONS FOR WRITS OF HABEAS CORPUS

A. The Language of the Statute Unambiguously Deprives the United States District Courts of Jurisdiction Over Collateral Attacks Upon Superior Court Sentences

23 D.C. Code 110 [11] grants to the Superior Court of the District of Columbia the general power to entertain collateral attacks upon its own sentences (23 D.C. Code 110(a)). The section provides for appeal only to the District of Columbia Court of Appeals (23 D.C. Code 110(f)), with ultimate review available in this Court under 28 U.S.C. 1257. The unambiguous language of the statute makes the Section 110 motion in Superior Court the exclusive remedy for collaterally challenging a Superior Court sentence. Congress provided in Section 110(g):

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

[11] Section 110 is set forth in its entirety in Addendum B to this brief *infra*, pp. 29a-30a.

By the terms of Section 110(g), no federal or state court may entertain a habeas corpus petition challenging a Superior Court sentence if the applicant (1) has failed to make a motion for relief in the Superior Court under Section 110, *or* (2) has made such a motion but has been denied relief by the Superior Court. The only exception to that comprehensive proscription is when it appears that the remedy by motion under Section 110 is "inadequate or ineffective" to test the legality of the applicant's detention.[12]

Section 110(g) thus establishes two independent categories of persons whose applications for habeas corpus may not be entertained by any court—those who have failed to seek relief in Superior Court

[12] A statutory collateral attack remedy is not "inadequate or ineffective" merely because the sentencing court has refused relief or because the decisional law in the court in which the defendant was convicted and sentenced is less favorable to him than in the court in which habeas corpus would lie. The remedy is "inadequate or ineffective" only if it can be shown that some limitation on scope or procedure prevented the collateral attack proceeding from providing a full hearing and adjudication. See *e.g.*, *Application of Galante*, 437 F. 2d 1164, 1165 (C.A. 3); *Accardi* v. *Blackwell*, 412 F. 2d 911, 913-914 (C.A. 5); *Cantu* v. *Markley*, 353 F. 2d 696, 698 (C.A. 7); *Cain* v. *Markley*, 347 F. 2d 408, 410 (C.A. 7).

Apart from respondents' constitutional objections to the status of the Superior Court, there is no suggestion that that court fails to provide an adequate and effective forum to adjudicate respondents' collateral attacks on their convictions.

and those who have been denied relief by the Superior Court. These two categories encompass all potential habeas corpus applicants who are in custody under sentences imposed by the Superior Court.[13] It therefore follows, under the terms of Section 110 (g), that United States District Courts are without jurisdiction to entertain habeas corpus applications on behalf of persons challenging sentences imposed by the Superior Court of the District of Columbia.

Despite this clear statutory language, the court of appeals concluded that 23 D.C. Code 110(g) is merely "an exhaustion of remedies statute," requiring only the "initial submission of claims to the local courts and marking * * * the terminal point for proceedings in the local court system" (Pet. App. 45a). Once an applicant has exhausted his remedies in the Superior Court under Section 110, he is entitled, according to the court of appeals, to file an application for a writ of habeas corpus in the United States District Court under 28 U.S.C. 2241, *et seq.* (see Pet. App. 46a, 61a).

That result gives effect to only one of the two clauses of Section 110(g)'s jurisdictional proscription ("shall not be entertained * * * if it appears that the applicant has failed to make a motion for relief under this section"). While that clause standing

[13] The only other possible category of persons sentenced by the Superior Court would include those who have sought and obtained relief under Section 110. Since the persons in that category have by definition already obtained the relief they sought, they would not be potential habeas corpus applicants.

alone would preclude relief in the United States District Courts in the absence of an exhaustion of remedies in the Superior Court, the court of appeals' construction of the statute completely ignores the second, wholly independent clause of Section 110(g) ("shall not be entertained * * * if it appears * * * that the Superior Court has denied him relief"). The second clause plainly deprives the United States District Courts of jurisdiction to award post-conviction relief to prisoners convicted in the Superior Court who have exhausted their remedies there but have been denied relief.

The court of appeals did not attribute to the second clause a meaning different from the one that we believe is inescapable. It simply read the statute as if the clause did not exist. That extraordinary departure from sound principles of statutory construction [14] is particularly unwarranted in this case, because "[j]urisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes.'" *Palmore* v. *United States*, 411 U.S. 389, 396, quoting from *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 212. The special care that

[14] Because "Congress is not presumed to have used words for no purpose" (*Platt* v. *Union Pacific R.R. Co.*, 99 U.S. 48, 58), it has long been "the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent" (*McDonald* v. *Thompson*, 305 U.S. 263, 266). See generally 2A Sutherland, *Statutes and Statutory Construction* § 46.06 (4th ed. 1973).

courts exercise in construing jurisdictional statutes derives at least in part from the understandable concern that it would be especially inappropriate for the judiciary to substitute its judgment for that of the legislature in a matter concerning the power of the courts.

The court of appeals here, however, has effectively obliterated from Section 110(g) an express limitation on the jurisdiction of the United States District Courts. Whatever other arguments may be advanced in support of that result, it cannot fairly be said to reflect "fidelity to the terms by which Congress has expressed its wishes" (*Cheng Fan Kwok*, *supra*, 392 U.S. at 212).

B. The Legislative History Of The Court Reform Act Confirms That Congress Meant What It Said In Section 110(g)

1. *Legislative history cannot justify disregard of unambiguous statutory language unless it reveals a Congressional purpose so plainly at variance with the language that to give meaning to the language would obviously defeat the will of Congress*

a. Since "the provisions of [Section 110(g)] are clear and unequivocal on their face," there should be "no need to resort to the legislative history of the Act" (*United States* v. *Oregon*, 366 U.S. 643, 648). "It is elementary that where no ambiguity exists there is no room for construction" (*United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 277). See

also *Caminetti* v. *United States*, 242 U.S. 470, 485. We recognize, however, that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'" (*United States* v. *American Trucking Associations*, 310 U.S. 534, 543-544; footnotes omitted).

While we therefore have no quarrel with the court of appeals' willingness to look "beyond the face of the statute to its legislative history" (Pet. App. 5a), we submit that the court framed the inquiry improperly. Believing that it would be "force[d] * * * directly to confront serious and significant constitutional questions" (*ibid.*) if the second clause of Section 110(g) were to be given effect, and believing also that "statutes should be interpreted to avoid difficult constitutional questions" (*ibid.*), the majority conceived of its legislative history inquiry as one designed to determine whether "Congress clearly intended" (*id.* at 27a) the result that follows unavoidably from the statutory language itself.

The court's analysis accordingly proceeded on the assumption that only strong affirmative indications in the legislative history that Congress knowingly and intentionally sought to deprive the federal district courts of post-conviction habeas corpus jurisdiction would justify giving that effect to the words of Section 110(g). Silence or ambiguity was perceived by the court as weighing heavily in favor of an interpretation that drains all meaning from one of the two

limiting clauses in the section (see, *e.g.*, Pet. App. 5a, 28a, 31a, 35a, 38a, 40a, 41a, 42a-45a).

In our view, the pertinent legislative history, correctly understood, satisfies even the court of appeals' erroneous standard, for it does in fact reflect a Congressional intention to achieve the statute's jurisdictional effect (see pp. 33-55, *infra*). But the unprecedented approach taken by the court of appeals turns the usual canons of statutory construction on their head. It should ordinarily be presumed that "Congress knew the significance and meaning of the language it employed" (*Barrett* v. *United States*, No. 74-5566, decided January 13, 1976, slip op. 5) and intended that language to be given full effect. Where, as here, the statutory language is unambiguous, silence in the legislative history is no basis for inferring that Congress did not mean what it said.

The proper inquiry in this case, therefore, is not whether the pertinent extrinsic materials demonstrate that "Congress clearly intended" (Pet. App. 27a) the full jurisdictional consequences of Section 110 (g), but rather whether the legislative history is so manifestly inconsistent with the legislation itself as to warrant the extraordinary conclusion that giving effect to the second clause of that section would negate rather than promote the Congressional will. See *United States* v. *Zacks*, 375 U.S. 59, 69. Unless it can be said that the plain meaning of the statute "leads to an unreasonable result plainly at variance with the policy of the legislation as a whole," the words of the statute should be given "their natural

significance" (*Ozawa* v. *United States*, 260 U.S. 178, 194).

b. The rule is not substantially different for cases in which the constitutionality of a statute is challenged. "When the validity of an act of the Congress is drawn in question, and * * * a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided" (*Crowell* v. *Benson*, 285 U.S. 22, 62; emphasis added). This "principle of constitutional adjudication * * * makes it decisive *in the choice of fair alternatives* that one construction may raise serious constitutional questions avoided by another" (*United States* v. *Rumely*, 345 U.S. 41, 45; emphasis added).

The court of appeals invoked this precept but overlooked its fundamental limitations, highlighted by the italicized phrases. With those limitations, the rule is a proper guide to legislative intent, since Congress may ordinarily be presumed to have intended a result that avoids constitutional difficulty. Divorced from those limitations, however, the rule would permit nullification of a legislative judgment on the strength of a judicial determination, not that the statute is unconstitutional, but merely that it raises constitutional questions. See Gunther, *Cases and Materials on Constitutional Law*, p. 1604 (9th ed. 1975).

That is why this Court has admonished that "[a] restrictive interpretation should not be given a statute merely because * * * giving effect to the express

language employed by Congress might require a court to face a constitutional question" (*United States* v. *Sullivan*, 332 U.S. 689, 693). The rule that "constructions giving rise to doubtful constitutional validity should be avoided * * * does not authorize a departure from clear meaning" (*Jay* v. *Boyd*, 351 U.S. 345, 357, n. 21). Indeed, "a distortion of the congressional purpose" is unjustified "even if the clearly correct purpose * * * leads inevitably to a holding of constitutional invalidity" (*United States* v. *Sullivan*, *supra*, 332 U.S. at 693). See Friendly, *Benchmarks*, pp. 210-212 (1967).

The court of appeals failed to heed these admonitions. It made no pretense of choosing between two "fairly possible" constructions (*Crowell* v. *Benson*, *supra*, 285 U.S. at 62) of the second clause of Section 110(g); nowhere in the court's opinion does there appear any suggestion of what meaning should be attached to that clause. The court of appeals simply read the clause out of the statute.

In order to view that result as reflecting a "choice of fair alternatives" (*United States* v. *Rumely*, *supra*, 345 U.S. at 45)—that is, in order for judicial nullification of a material statutory clause to be characterized as a "fair alternative" to giving effect to the clause—one would have to find in the legislative history compelling evidence that the pertinent statutory words, if given "their natural significance" (*Ozawa* v. *United States*, *supra*, 260 U.S. at 194), would wholly defeat the Congressional intent.

The court of appeals, by demanding, instead, evidence that "Congress clearly intended" (Pet. App. 27a) that the language of Section 110 be given its natural meaning, drew erroneous inferences from the legislative history and reached a conclusion that represents a "distortion of the congressional purpose" (*United States* v. *Sullivan*, *supra*, 332 U.S. at 693). The court's "construction" of the second clause of Section 110(g) amounts, in practical effect, to a declaration of unconstitutionality without a reasoned resolution of the constitutional issues.

If the court of appeals had made the proper inquiry into the Act's legislative history, and had fully appreciated the limitations upon the doctrine of avoiding unnecessary constitutional adjudication, it would have had no choice but to confront and decide respondents' constitutional contentions.[15]

2. *The Congressional purpose is wholly consistent with the language of Section 110(g)*

a. In the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, Congress restructured the judicial system of the District of Columbia. Prior to 1970, the District's municipal court system consisted of one trial court of limited civil and criminal jurisdiction (the District of Columbia Court of General Sessions); two trial courts of special jurisdiction (the Juvenile Court of the District of Columbia and the District of Columbia

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[15] We address those contentions later in this brief (pp. 55-72, *infra*).

Tax Court); and one appellate court (the District of Columbia Court of Appeals), whose judgments were subject to review by the United States Court of Appeals for the District of Columbia Circuit. 11 D.C. Code (1967 ed.) 321, 701, 901, 1501. The criminal jurisdiction of the Court of General Sessions was restricted to misdemeanors and petty offenses. 11 D.C. Code (1967 ed.) 963.

The United States District Court for the District of Columbia, in addition to the jurisdiction it had in common with other United States District Courts, had concurrent jurisdiction over most of the criminal and civil matters cognizable in the local courts. 11 D.C. Code (1967 ed.) 521-523, 963. It had exclusive jurisdiction over felony prosecutions for violations of the District of Columbia Code. 11 D.C. Code (1967 ed.) 521, 963. Appeals from such convictions were taken to the United States Court of Appeals for the District of Columbia Circuit, and that court accordingly played the major role in developing the criminal jurisprudence for the District of Columbia.

Collateral attacks against convictions obtained in the Court of General Sessions and the Juvenile Court were brought by motion in those courts under the authority of decisions holding that those courts had "inherent power" to grant collateral relief. *Burke* v. *United States*, 103 A. 2d 347 (D.C. App.); *Ingols* v. *District of Columbia*, 103 A. 2d 879 (D.C. App.). All persons confined "within the District" were authorized to apply to the United States District Court for the District of Columbia for writs of habeas

corpus. 16 D.C. Code (1967 ed.) 1901. But, as a practical matter, this provision applied primarily to persons detained prior to trial or awaiting sentence, since most persons convicted and sentenced in the District of Columbia were then, as they are now, confined in correctional facilities outside the territorial limits of the District. Under *Ahrens* v. *Clark*, 335 U.S. 188, the District's courts had held that they had no power to issue a writ of habeas corpus unless both the prisoner and his custodian were within the territorial jurisdiction of the District. *McAffee* v. *Clemmer*, 171 F. 2d 131, 131-132 (C.A. D.C.); *Thompson* v. *District of Columbia*, 158 A. 2d 687 (D.C. App.). See also *McCall* v. *Swain*, 510 F. 2d 167, 173-175 (C.A. D.C.).

In the 1970 Court Reform Act, "Congress reorganized the court system in the District of Columbia and established one set of courts in the District with Art. III characteristics and devoted to matters of national concern. It also created a wholly separate court system designed primarily to concern itself with local law and to serve as a local court system for a large metropolitan area." *Palmore* v. *United States*, 411 U.S. 389, 408.

The new local court system consists of a trial court of general jurisdiction (the Superior Court of the District of Columbia) and an appellate court (the District of Columbia Court of Appeals). 11 D.C. Code 701, 901. The Superior Court has jurisdiction "of any criminal case under any law applicable exclusively to the District of Columbia" (11 D.C. Code

923(b)). The former jurisdiction of the United States Court of Appeals for the District of Columbia Circuit to review the judgments of the District of Columbia Court of Appeals was eliminated (see 11 D.C. Code 301). The District of Columbia Court of Appeals was denominated the "highest court of the District of Columbia," and its judgments were made reviewable only by this Court under 28 U.S.C. 1257 (11 D.C. Code 102).[16]

The primary reason for enacting the Court Reform Act was that "Congress had concluded that there was a crisis in the judicial system of the District of Columbia, that case loads had become unmanageable, and that neither those matters of national concern nor those of strictly local cognizance were being promptly tried and disposed of by the existing court system" (*Palmore* v. *United States*, *supra*, 411 U.S. at 408). Congress found that the "alarming and unremitting increases" in crime in the District could "be traced in significant part to the inadequacy of the District's judicial machinery and to critical defects here in the administration of criminal justice." S. Rep. No. 91-405, 91st Cong., 1st Sess. 2 (1969). Believing that "swift and sure justice" would help relieve "the soaring crime rate" and that "reorganization of the court system * * * is a step toward

[16] The Act also upgraded and expanded the local court system. The number of judges was increased, their tenure was lengthened from 10 to 15 years, and their salaries were raised. 11 D.C. Code 702, 703, 903, 904, 1502. The salary and tenure provisions of the Court Reform Act are discussed in a later section of this brief, *infra*, pp. 59-60.

swifter and surer justice in the District," Congress determined to provide for a "total transfer of local jurisdiction" from the United States District Court and United States Court of Appeals to the Superior Court and the District of Columbia Court of Appeals. H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 25, 33 (1970).

The theory of the reorganization was described by this Court in the first *Palmore* case (411 U.S. at 408-409):

> The remedy in part, was to relieve the regular Art. III courts, that is, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city and to confine the work of those courts to that which, for the most part, they were designed to do, namely, to try cases arising under the Constitution and the nationally applicable laws of Congress. The other part of the remedy, equally essential, was to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 States of the Union with responsibility for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction.

By expanding and upgrading the local court system while relieving the Article III courts of their respon-

sibility for the administration of criminal justice with respect to D.C. Code offenses, Congress sought to assure speedier justice in both court systems. The enlarged Superior Court was equipped by Congress to administer swift justice to persons accused of D.C. Code crimes; the United States District Court, freed of responsibilities with respect to local criminal matters, was expected to have the resources to administer speedy justice to persons accused of U.S. Code offenses.[17]

b. Section 110 serves an important function in accomplishing the central purposes of the Court Reform Act. In order to free the Article III court system from the crushing burdens of criminal litigation with respect to D.C. Code offenses, Congress effected a "total transfer" of local criminal justice responsibilities from those courts to the local courts (H.R. Rep. No. 91-907, *supra*, p. 33). The role of Section 110 in that transfer of jurisdiction is to insulate the

[17] The legislation has been effective. Statistics compiled by the Administrative Office of the United States Courts show that the median time for disposing of criminal cases in the United States District Court for the District of Columbia has decreased from the "crippling figure of 9½ months * * * during fiscal year 1968" (S. Rep. No. 91-405, *supra*, p. 2) to 3.7 months in fiscal year 1975. Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1975, p. XI-111. Similarly, the district court disposed of 1,890 criminal cases in calendar year 1968 and had a backlog of 1,669 pending cases at the end of that year. S. Rep. No. 91-405, *supra*, pp. 2-3. By contrast, the district court disposed of 845 criminal cases in fiscal year 1975 and had only 399 cases pending on its docket at the end of that period. Annual Report, *supra*, p. XI-96.

Article III courts from collateral involvement in such local criminal litigation in duplication of the collateral proceedings in the Superior Court.

If a person sentenced in Superior Court upon a conviction of a D.C. Code offense could, after exhausting local remedies, apply for a writ of habeas corpus in the United States District Court, the Article III court system would once again have to divert resources from its principal task—"to try cases arising under the Constitution and the nationally applicable laws of Congress" (*Palmore* v. *United States*, *supra*, 411 U.S. at 409)—and devote those resources to the administration of the local criminal justice system. That would naturally tend to compromise the ability of the district court to dispense prompt justice in criminal cases involving U.S. Code offenses.[18] Thus, by channeling all collateral attacks upon Superior Court sentences to the Superior Court itself, Section 110 protects the integrity of the reorganization plan and avoids unnecessary duplication

[18] The court of appeals stated that "[t]he transfer of trial jurisdiction effectuates the goal of swift justice; the question of post-collateral [*sic*] relief does not affect that process at all" (Pet. App. 38a). But that statement mistakenly assumes that Congress intended to assure prompt justice only in the Superior Court. As we have shown, and as this Court indicated in the first *Palmore* case (411 U.S. at 408-409), the Act was designed as well to enable the district court to administer swift justice in criminal cases brought under "the nationally applicable laws of Congress" (*id.* at 409). To the extent that the district court must adjudicate habeas corpus cases arising under locally aplicable laws, its capacity to perform its primary function with respect to cases arising under nationally applicable laws would be reduced.

of effort on the part of the federal judiciary, ensuring that the Act's division of criminal justice responsibilities is not defeated by means of habeas corpus litigation.[19]

c. The few specific references in the legislative history to the provisions of Section 110 confirm that Congress intended to preclude district court adjudication of post-conviction challenges to Superior Court sentences. The House Committee on the District of Columbia explained the provision as follows (H.R. Rep. No. 91-907, *supra*, p. 117):

> Rather than relying on the inherent power of the Superior Court to collaterally vacate sentences and grant post conviction relief, a new section, section 23-110, provides statutory procedures for collateral post conviction challenges, modeled on 28 U.S.C. § 2255 with only necessary technical changes.

Nearly identical language appeared in the report of

[19] It is no answer to say, as the court of appeals did, that an application for a writ of habeas corpus that challenges a Superior Court sentence on constitutional grounds "is a case arising under the Constitution" (Pet. App. 38a) and therefore within the class of cases that Congress intended the district courts to adjudicate. Congress drew the jurisdictional line not on the basis of the issues tendered by a litigant but on the basis of the underlying criminal offense with which the litigant was charged. The Article III courts were assigned the criminal cases arising under nationally applicable laws. The Article I courts "handle criminal cases only under statutes that are applicable to the District of Columbia alone" (*Palmore* v. *United States*, *supra*, 411 U.S. at 407). That division of responsibility is no less applicable when, in a case properly assigned to the local court system, a litigant raises an issue of constitutional law.

the Senate Committee (S. Rep. No. 91-405, *supra*, p. 38).

The court of appeals inferred from these statements that Congress intended in Section 110 merely to provide "a detailed statutory remedy" explicitly authorizing the Superior Court to entertain post-conviction challenges to its own sentences "rather than leaving the new local courts to rely once again upon their inherent authority" to entertain such collateral attacks (Pet. App. 30a).

The court of appeals could find no basis for concluding that Congress intended the newly created statutory remedy to be exclusive. Rather, relying upon the general legislative aim of establishing "a dual court system analogous to the relationship between the federal and state courts" (Pet. App. 33a), the court determined that Congress must have intended to "allow the district court to entertain petitions for collateral review in the same manner as district courts do for the fifty states" (*id.* at 35a). Looking, therefore, to the provisions of 28 U.S.C. 2254 as a guide to the meaning of Section 110 (see Pet. App. 45a),[20] the court of appeals concluded that Section

[20] Section 2254—which is set forth in Addendum B to this brief, *infra*, pp. 24a-27a — gives federal district courts jurisdiction to entertain a state prisoner's application for a writ of habeas corpus if the applicant claims that he is in custody in violation of the Constitution or laws of the United States. The section provides that the application "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State" or that the State's corrective process is unavailable or ineffective. 28 U.S.C. 2254(b).

110, like Section 2254, should be construed as "an exhaustion of remedies statute, requiring initial submission of claims to the local courts" (*ibid.*).

The court's analysis is seriously flawed. First, although Congress unquestionably envisioned the reorganized District of Columbia judicial system as essentially "analogous to court systems in the several States" (H.R. Rep. No. 91-907, *supra*, p. 35), the analogy was not meant to be perfect. For example, the judges of the District of Columbia courts, unlike the judges of state courts, are nominated by the President and confirmed by the Senate. It is not surprising, in light of the federal control over the appointing process for local court judges, that Congress would choose to make those judges, unlike state judges, exclusively responsible for adjudicating collateral challenges to Superior Court sentences.

Second, even if the general federal-state analogy might, in the absence of Section 110, suggest the appropriateness of looking to 28 U.S.C. 2254 for guidance concerning the probable Congressional intent with respect to post-conviction remedies, Section 110 clearly provides a comprehensive post-conviction remedial scheme. Its provisions are not like those of 28 U.S.C. 2254. Rather, they are nearly identical to those of 28 U.S.C. 2255.[21] And if there were any remaining doubt concerning the proper

[21] Section 110 and Section 2255 are set forth in full in Addendum B to this brief, *infra*, pp. 27a-30a. Subsection (g) of Section 110, together with the corresponding portion of Section 2255, is also set forth at pp. 2-3, *supra*.

inference to be drawn from that remarkable resemblance, the legislative history reflects that the model for Section 110 was Section 2255, not Section 2254.

To the extent that the provisions of Section 110 are thought to be unclear, therefore, the place to look for assistance is Section 2255. Indeed, "[t]o read [Section 110] without reference to this model is to read it out of the context in which Congress enacted it" (*Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 541).

Section 2255 provides that a prisoner seeking to challenge collaterally the validity of a sentence imposed by a court established by Act of Congress may proceed by motion in the sentencing court. It also provides that an application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion under Section 2255 "shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." [22]

[22] 23 D.C. Code 110(g) contains nearly identical language. It provides (with italics to indicate differences) that an application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for post-conviction relief by motion in the Superior Court "shall not be entertained *by the Superior Court or by any Federal or State Court* if it appears that the applicant has failed to *make a motion for relief under*

Section 2255 "was intended * * * to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined" (*Hill* v. *United States*, 368 U.S. 424, 427). See also *Sanders* v. *United States*, 373 U.S. 1, 13-15; *United States* v. *Morgan*, 346 U.S. 502, 511; *United States* v. *Hayman*, 342 U.S. 205, 219. There is no support in any of this Court's decisions for the view that Section 2255 is merely an exhaustion of remedies provision, entitling a prisoner to seek habeas corpus relief in another court after having been unsuccessful in the collateral attack proceeding in the sentencing court. On the contrary, the post-conviction remedy by motion in the sentencing court wholly displaces traditional habeas corpus relief except when the motion procedure is "inadequate or ineffective." [23] "If relief is possible under § 2255, it is the exclusive remedy and habeas corpus is barred for a federal prisoner." 2 Wright, *Federal Practice and Procedure: Criminal*, § 591, p. 584 (1969).

Congress intended the same result under the materially indistinguishable provisions of 23 D.C. Code 110.[24] Although the court of appeals concluded that

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this section or that *the Superior Court* has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

[23] On the meaning of that phrase, see note 12, *supra*.

[24] This understanding is evidenced by the fact that, shortly after its enactment, the man who had been counsel to the Senate Committee on the District of Columbia when it re-

Section 110 was merely an exhaustion of remedies provision, permitting applications for writs of habeas corpus by persons whose Section 110 motions have been denied by the Superior Court, the majority understandably could point to nothing in the legislative history to explain why Congress would adopt the language of Section 2255 to accomplish a result so different from that of Section 2255.

As if to ensure that no court would misconstrue the comprehensive nature of the bar of Section 110 (g) against collateral attacks of any kind except by motion in Superior Court, Congress made a significant addition to the language of Section 2255 in adapting it to the purposes of the Court Reform Act. Whereas Section 2255 provides that an application for a writ of habeas corpus by a person authorized to seek relief by motion in the sentencing court "shall not be entertained," Section 110(g) provides that an application for a writ of habeas corpus in such circumstances "shall not be entertained *by the Superior Court or by any Federal or State court*" (emphasis added). This is surely the single most significant clue in the legislative history regarding the Congressional purpose. The added (and seemingly re-

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ported out the Court Reform Act wrote that "the Court Reorganization Act extinguishes the traditional authority of the federal courts to review local judicial action by the issuance of writs of habeas corpus." Williams, *District of Columbia Court Reorganization, 1970*, 59 Geo. L.J. 477, 499 (1971). See also Rauh and Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 Am.U.L. Rev. 252, 339-340 (1970).

dundant) language eliminated any possible basis for construing Section 110(g)'s prohibition as merely an exhaustion provision rather than as a bar to the exercise of post-conviction habeas corpus jurisdiction by the Article III federal courts. (Compare the statute considered by this Court in *Gusik* v. *Schilder*, 340 U.S. 128, discussed at pp. 49-51, *infra*.)

We accordingly submit that the conclusion is inescapable that Section 110, like Section 2255, is designed to give the sentencing court *exclusive* jurisdiction, except in extraordinary circumstances, to entertain post-conviction challenges to the validity of its own sentences.[25]

d. The court of appeals believed that, if Congress had intended to deprive the United States District Court of habeas corpus jurisdiction over post-conviction challenges to Superior Court sentences, the proposed legislation would "have sparked considerable debate and controversy" (Pet. App. 38a). But that would be true only if the members of Congress viewed Section 110 the way the court of appeals viewed it—as a possibly unconstitutional

[25] Although the United States District Courts are consequently without general authority to entertain habeas corpus applications on behalf of persons attacking Superior Court sentences, that does not mean that "the district court here [in the District of Columbia] would possess less jurisdiction than in other districts" (Pet. App. 35a). Under Section 110(g), habeas corpus applications may not be entertained "by *any* Federal * * * court" (emphasis added). The jurisdiction of the District Court for the District of Columbia is neither greater nor lesser in this respect than that of any other district court.

suspension of the privilege of the writ of habeas corpus that would, in any event, "effectuate a substantial reduction" in the jurisdiction of Article III courts (Pet. App. 41a).

There is every reason to believe, however, that Congress viewed Section 110, modeled as it was upon the familiar provisions of 28 U.S.C. 2255, as an essentially uncontroversial measure that would import into the local court system the same effective post-conviction procedures that had been applicable in the United States District Courts since 1948. Both provisions serve the important practical purpose of confining collateral attacks upon criminal convictions to the forum that is likely to be the most convenient and best equipped to adjudicate them—the sentencing court. See *United States* v. *Hayman, supra; Hill* v. *United States, supra.*

One apparent consequence of the court of appeals' reading of Section 110, however, would be that the many prisoners confined outside the District of Columbia under sentence of the Superior Court could attack their convictions in the United States District Court in the district of their confinement.[26] It is reasonable to suppose, in view of the purposes of the statute on which Section 110 was modeled, that the prospect of district courts in Kansas or Georgia or Illinois reviewing the judgments of the local District

[26] The United States Bureau of Prisons has informed us that, as of October 28, 1975, a total of 2,678 persons who had been convicted of D.C. Code offenses were incarcerated in institutions located outside the District of Columbia (2,060

of Columbia courts would itself have "sparked considerable debate" (Pet. App. 38a) if Congress had understood that to be the effect of the provision.

In these circumstances, if "the congressional silence, when contrasted with the extended constitutional debates over other proposals, [is] both 'curious' and significant" (Pet. App. 40a; footnote omitted), the implication is not that "Congress never intended section 110 to affect the district court's jurisdiction" (*id.* at 41a), but rather that Congress saw no serious constitutional difficulty with a provision that would commit to the federally appointed District of Columbia judges exclusive responsibility (subject to the availability of review by this Court) for the trials and post-conviction proceedings in criminal cases arising under locally applicable law (see pp. 55-72, *infra*). Congress had provided 20 years earlier in 28 U.S.C. 2255 that post-conviction collateral attacks upon sentences imposed by the Article I territorial courts must be brought exclusively by motion in those courts,[27] and no court had found in the intervening period that the statute was in that respect unconstitutional. There was thus no reason for Congress to assume that the constitutionality of the precisely parallel provision of Section 110 would be in serious doubt.

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of them at Lorton Reformatory, in the Eastern District of Virginia), while only 651 such persons were incarcerated within the District of Columbia.

[27] See *United States ex rel. Leguillou* v. *Davis*, 212 F. 2d 681 (C.A. 3); note 31, *infra*.

The decisions of this Court on which the court of appeals principally relied are inapposite. This is not a case like *Brown* v. *Allen*, 344 U.S. 443, where the Court was "unwilling to conclude without a definite congressional direction" that the language of 28 U.S.C. 2254—precluding federal habeas corpus unless the applicant has "exhausted the remedies available in the courts of the State * * * by any available procedure" (28 U.S.C. 2254(c))—"was intended by the Congress to eliminate the right of a state prisoner to apply for relief by habeas corpus to the lower federal courts" (344 U.S. at 450). Barring state prisoners from all access to post-conviction federal habeas corpus remedies would have been a significant change indeed, and neither the language of the statute nor the legislative history suggested any such Congressional purpose (*id.* at 449-450).

Here, by contrast, the legislation left to the United State District Courts the same function that they have under 28 U.S.C. 2255. Their post-conviction habeas jurisdiction in both cases comes into play only if the remedy by motion in the sentencing court is inadequate or ineffective to test the legality of the applicant's detention. Both the statutory language and the legislative history of Section 110 provide "a definite congressional direction" (344 U.S. at 450) that the Superior Court's jurisdiction over collateral post-conviction proceedings is otherwise exclusive.

Similarly, Section 110 represents no "break with history" comparable to the one that would have re-

sulted if Congress, in Article 53 of the Articles of War, "had intended to deprive the civil courts of their habeas corpus jurisdiction" to entertain challenges to court-martial judgments. *Gusik* v. *Schilder*, 340 U.S. 128, 132-133. The Court in *Gusik*, finding no "plain and unmistakable" expression of such a legislative purpose, was unwilling to give the language of Article 53 the "strained construction" that would have been necessary "to stir the constitutional issue that is tendered" (*id.* at 133).

Unlike Article 53—which provided that the action of the Judge Advocate General upon a request for a new trial "shall be final and conclusive" and that an order publishing such action "shall be binding upon all departments, courts, agencies, and officers of the United States" (340 U.S. at 130, n. 1)—23 D.C. Code 110(g) explicitly precludes any court from entertaining an application for a writ of habeas corpus unless the remedy by motion in the Superior Court is "inadequate or ineffective." Thus, not only is the result here far less drastic than that attributed to Article 53 by the petitioner in *Gusik*, but also the statute and its legislative history here reflect a "plain and unmistakable" Congressional purpose (*id.* at 133) to limit the habeas corpus jurisdiction of the district courts in favor of the remedy by motion in the Superior Court. Whereas "[t]he finality language [of Article 53] so adequately serve[d] the more restricted purpose" of requiring an exhaustion of military remedies prior to resorting to federal habeas corpus (*ibid.*), the language of Section 110 does

not lend itself to a similar reading. It would take "a strained construction" (*ibid.*) here to *avoid* the constitutional question.

Nor is Section 110 like the proposed legislation to which the court of appeals referred to illustrate the kind of constitutional debate in Congress that it believed Section 110 should have generated (see Pet. App. 38a-40a). Proposed Section 702 of the Omnibus Crime Bill of 1968, S. 917, 90th Cong., 2d Sess. (set forth at Pet. App. 39a, n. 41), would have eliminated all jurisdiction in Article III courts to provide post-conviction habeas corpus relief to state prisoners challenging their state convictions. Similarly, the provisions of S. 567, 93d Cong., 1st Sess., (1973), would have restricted the availability of post-conviction federal habeas corpus relief for both federal and state prisoners (see Pet. App. 40a, n. 43).

No such changes were made by Section 110. Like 28 U.S.C. 2255, Section 110 provides a remedy in the sentencing court that, in terms of its nature and scope, is "exactly commensurate with that which had previously been available by habeas corpus" (*Hill* v. *United States*, *supra*, 368 U.S. at 427).[28] Since

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[28] Prior to the enactment of the Court Reform Act, the post-conviction remedy of habeas corpus was available at most to persons convicted of D.C. Code misdemeanors and petty offenses. Since the United States District Court had exclusive jurisdiction over D.C. Code *felony* prosecutions, persons convicted of felonies were, under 28 U.S.C. 2255, even then restricted to the remedy by motion in the sentencing court. We therefore do not, by our reference to the decision in *Hill*,

Section 2255 stirred little Congressional debate (see *United States* v. *Hayman*, *supra*, 342 U.S. at 214-219), there is little reason to suppose that the nearly identical provisions of Section 110 would provoke controversy.

e. Respondent Palmore appended to his brief in opposition to our petition for certiorari portions of documents furnished to him by the Department of Justice on his request after the judgment of the court of appeals had been entered. The documents are: (1) an internal Department of Justice memorandum prepared in July 1969 in connection with the Department's work on the Court Reform Act, a portion of which memorandum (Br. in Opp. App. 2a-5a) addresses the question "[s]hould a provision similar to 28 U.S.C. 2255 be enacted to govern post-conviction remedies in the new court system?"; (2) a letter dated July 11, 1969, from the Attorney General to the Speaker of the House transmitting the Department's legislative proposal to reorganize the District of Columbia judicial system (*id.* at 6a-8a); (3) a summary of the Department's proposed legis-

acquiesce in any description of Section 110 as having significantly diminished the habeas corpus jurisdiction of the district courts. For the most part, any reduction of habeas-type collateral litigation in the district courts followed from the Act's transfer of D.C. Code felony jurisdiction to the local court system, with the result that the district court was no longer the sentencing court with respect to those offenses.

lation (*id.* at 9a-13a), one paragraph of which (*id.* at 13a) refers to Section 110; and (4) a summary of amendments relating to criminal law and procedure (*id.* at 14a-15a), one paragraph which relates to Section 110 (*id.* at 15a).

None of these materials "furnish[es] additional support for the decision below" (Br. in Opp. 16). The only documents that were transmitted to Congress were the Attorney General's letter and its accompanying summary. The letter does not mention Section 110; the summary describes the section in essentially the same terms used by the Senate and House Committee Reports (see Br. in Opp. App. 13a; pp. 40-41, *supra*).

Neither of the internal documents is probative with respect to the intent of Congress, because neither was conveyed to Congress.[29] But to the extent that they may shed light on the thinking of Department of Justice lawyers, they confirm rather than undercut the plain meaning of the statutory language.

Palmore attributes controlling significance to a sentence in the July 1969 internal Department mem-

[29] Mr. Justice Holmes remarked that, in construing a statute, "[w]e do not inquire what the legislature meant; we ask only what the statute means." *The Theory of Legal Interpretation*, 12 HARV.L.REV. 417, 419 (1899), quoted in *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1, 14, n. 9. One need not agree with that view in order to reject Palmore's suggestion that this Court inquire neither what the statute means, nor even what the legislature meant, but what the Department of Justice lawyers meant in proposing the legislation.

orandum explaining that one of the minor differences between the proposed Section 110 and its model, 28 U.S.C. 2255, was that Section 110 "make[s] it clear that a habeas corpus motion shall not be entertained *in any court* unless the prisoner has first filed motion to vacate judgment in the Superior Court of the District of Columbia when that is the appropriate remedy" (Br. in Opp. App. 4a; emphasis in original). The author was obviously focusing on the italicized words, not on the description of Section 110's operation. To the extent that the rest of the sentence implies that Section 110 would operate only as an exhaustion of remedies provision, the sentence is contradicted by another sentence on the same page, in which the author correctly states that Section 110 would result in "uniform procedures in Federal and local courts" (Br. in Opp. App. 4a). Indeed, considered as a whole, the portion of the memorandum discussing the subject of collateral attack on criminal convictions makes clear that Section 110 was viewed as identical in all material respects to 28 U.S.C. 2255. It could hardly have been so viewed if it was thought that a court other than the sentencing court would also have power to entertain collateral attacks.

Moreover, the other internal Department document included in Palmore's appendix states unequivocally that the proposed Section 110 would "requir[e] that a prisoner challenging his conviction or sentence do so in the convicting court" and that, "[a]s is the case in federal courts, habeas corpus would be barred unless the statutory remedy is inadequate or ineffective" (Br. in Opp. 15a).[30]

II

SECTION 110 DOES NOT VIOLATE THE CONSTITUTION

The court of appeals identified two constitutional questions that it believed would be raised if Section 110 were interpreted—as we have shown it must be—to preclude Article III district courts from routinely entertaining post-conviction habeas corpus applications challenging Superior Court sentences. Those questions are: (1) whether the statute suspends the privilege of the writ of habeas corpus, in violation of Article I, Section 9, Clause 2, of the Constitution; and (2) whether it denies to persons convicted of criminal offenses in the Superior Court the equal protection of the laws, in contravention of the Due Process Clause of the Fifth Amendment.

The court of appeals discussed but did not decide these questions, determining instead to "construe" the statute so as to avoid them. Because neither

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[30] Palmore asserts that these comments in the Department's memorandum do "not address the issue involved in this case since the introductory clause '[a]s is the case in federal courts' makes it clear that the reference is to the habeas corpus jurisdiction of the local courts, and not to the federal courts" (Br. in Opp. 18, n. 30). While we hesitate to embroil ourselves further in a bootless discourse over the correct interpretation to be given to Department of Justice memoranda that were not communicated to Congress, we note that Palmore's reading of the Department's memorandum is quite obviously "strained and unnatural" (*Chandler* v. *Roudebush*, No. 74-1599, decided June 1, 1976, slip op. 8).

the language nor the legislative history of Section 110 permits such a construction, we do not believe that the constitutional questions may properly be avoided.

A. The Statute Does Not Suspend the Privilege of the Writ of Habeas Corpus

The only mention of the writ of habeas corpus in the Constitution is in Article I, Section 9, Clause 2, which states:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Respondents' argument, as summarized by the court of appeals, has two elements. First, they contend that Congress, having created the inferior Article III courts and having vested them with jurisdiction to entertain post-conviction applications for writs of habeas corpus, "may not, consistent with the suspension clause, dilute or remove" that jurisdiction (Pet. App. 17a) unless it "substitute[s] a remedy 'exactly commensurate' with the Great Writ" (*id.* at 14a). Second, they argue that Section 110's substitute remedy—a post-conviction motion in the Superior Court—is not commensurate with the writ of habeas corpus "because the article III salary and tenure protections were not extended to Superior Court judges" (*id.* at 15a). It follows, on respondents' analysis, that insofar as Section 110 dilutes the jurisdiction of the Article III district courts to

entertain post-conviction habeas corpus applications, it impermissibly suspends the privilege of the writ.

Both elements of respondents' argument are incorrect. To facilitate analysis, we address those elements in reverse order.

1. *Section 110, like 28 U.S.C. 2255, provides in the sentencing court a post-conviction remedy exactly commensurate with the writ of habeas corpus*

The remedy provided in Section 110 is in all material respects—including the grounds upon which relief may be sought, the nature of the relief that may be granted, and the procedure for considering a request for relief—equivalent to the writ of habeas corpus. That much is settled by this Court's decision in *United States* v. *Hayman*, 342 U.S. 205, which held that 28 U.S.C. 2255—the provisions of which are virtually identical to those of 23 D.C. Code 110—affords to federal prisoners "the same rights" of collateral attack on their convictions that they previously had by way of habeas corpus, but "in another and more convenient forum," namely, the sentencing court rather than the court in the district of confinement (342 U.S. at 219). As the Court reiterated in *Hill* v. *United States*, 368 U.S. 424, 427, "it conclusively appears from the historic context in which § 2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined."

Since, as Judge Robb stated below in his dissenting opinion in *Palmore*, "[t]he relief defined in section 110 * * * is the equivalent of federal habeas corpus relief * * *, the basis for the argument that 'section 110 is not exactly commensurate to habeas corpus' is reduced to the difference in the tenure and salary protections accorded District Court and Superior Court judges" (Pet. App. 50a).

Like Judge Robb, we think the argument "is answered in principle" (*ibid.*) by this Court's decision in the first *Palmore* case, where the same "difference in the tenure and salary protections" (*ibid.*) was the basis of Palmore's contention that "criminal offenses under the laws passed by Congress may not be prosecuted except in courts established pursuant to Art. III" (411 U.S. at 400). This Court, while not "discount[ing] the importance attached to the tenure and salary provisions of Art. III," nevertheless "conclude[d] that Congress was not required to provide an Art. III court for the trial of criminal cases arising under its laws applicable only within the District of Columbia" (*id.* at 410), even though federal constitutional issues (such as Palmore's Fourth Amendment claims) might be expected to arise in such cases.

Here, too, one need not discount the importance of the Article III tenure and salary provisions to conclude that Congress was not required to provide an Article III court for the adjudication of post-conviction challenges to sentences imposed by the Article I Superior Court in "criminal cases arising

under * * * laws applicable only within the District of Columbia" (*ibid.*). Even if one assumes—as we do not (see pp. 63-67, *infra*)—that the Suspension Clause guarantees respondents an opportunity to challenge their Superior Court convictions collaterally on constitutional grounds, nothing in the text of that clause or elsewhere in the Constitution supports their contention that Congress must provide an Article III forum for such a challenge and that a federally constituted court established pursuant to Article I is an inadequate forum for that purpose.

The judges of the Superior Court and the District of Columbia Court of Appeals are nominated by the President and confirmed by the Senate. 11 D.C. Code 1501(a). They take the oath proscribed for judges of courts of the United States. 11 D.C. Code 704, 905. Their tenure is 15 years, subject to mandatory retirement at age 70 and to removal, retirement, or suspension under specified circumstances by a Commission on Judicial Disabilities and Tenure. 11 D.C. Code 1502, 1521. The judges are automatically reappointed for an additional term of 15 years if a Judicial Nomination Commission determines that they are well qualified or exceptionally well qualified for reappointment. 11 D.C. Code App. (Supp. II) 433(c). Their compensation is fixed at 90 percent of the rate prescribed by law for United States District Court and United States Court of Appeals judges, respectively. 11 D.C. Code 703(b), 904(b).

Congress endeavored through these measures to structure a judicial system that would attract highly qualified persons to the local bench and assure their independence once appointed. S. Rep. No. 91-405, *supra*, pp. 8-11; H.R. Rep. No. 91-907, *supra*, pp. 35-39; 116 Cong. Rec. 24342-24343 (1970). "It was thought that such a system would be more workable and efficient in administering and discharging the work of a multifaceted metropolitan court system" (*Palmore* v. *United States*, *supra*, 411 U.S. at 409).

Although the Article III salary and tenure provisions applicable to United States District Judges are not extended to Superior Court judges, the structure created by Congress goes far toward providing analogous assurances to Superior Court judges. There is no reason to suppose that, as Article I federal judges, they are institutionally less able or less likely than are Article III district judges to give full and fair consideration to federal constitutional claims.

But even if one were to assume that the privilege of the writ of habeas corpus is in some sense diminished if its availability is limited to a federal court staffed by judges with Article I rather than Article III status—an assumption that we do not believe is supported by any decision of this Court —that would not amount to a *suspension* of the privilege. At least so long as the scope of and grounds for habeas corpus relief are left unaffected, we are aware of no textual or decisional basis for a claim that, merely because a person must apply for

the writ to a federal court constituted under Article I rather than under Article III, the privilege has been suspended in violation of the Constitution.[31]

The Constitution's history, we think, firmly supports the view that the Suspension Clause was not meant to foreclose Congress from controlling the procedural and jurisdictional aspects of habeas corpus. We have set forth as Addendum A to this

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[31] Indeed, if respondents' theory were correct, 28 U.S.C. 2255 presumably would also violate the Suspension Clause insofar as it provides that a person collaterally attacking a sentence imposed by an Article I territorial court (such as the District Court of the Virgin Islands) must do so by motion in the sentencing court. It is settled that "Section 2255 * * * made the District Court of the Virgin Islands the exclusive forum" for such post-conviction proceedings and that an Article III court would lack jurisdiction to entertain an application for a writ of habeas corpus unless the remedy by motion were inadequate or ineffective to test the legality of the applicant's detention. *United States ex rel. Leguillou* v. *Davis*, 212 F. 2d 681, 684 (C.A. 3). Although an appeal from a reviewable decision of a territorial court may be taken to a United States Court of Appeals (28 U.S.C. 1294), so that a territorial court movant under Section 2255, unlike a Superior Court movant under Section 110, has access at the appeal stage to an Article III tribunal, that distinction would not seem to justify a different result under the Suspension Clause. For if the privilege of the writ of habeas corpus requires an Article III tribunal for the adjudication of applications for the writ, and if substituting an Article I court system is a diminishment of the privilege that amounts to a suspension in violation of the Constitution, it is difficult to see why the availability of an Article III forum to review the Article I court's decision for legal errors would so far minimize the effect of limiting collateral challenges to the Article I sentencing court as to make constitutionally permissible what would otherwise be a prohibited "suspension" of the privilege.

brief, *infra*, pp. 1a-20a, a discussion of the pertinent historical materials taken from the Brief for the United States in *United States* v. *Hayman*, *supra*, in which the issue was whether, by providing in 28 U.S.C. 2255 that collateral challenges to federal sentences may be brought only by motion in the sentencing court and not by application for writ of habeas corpus, Congress violated the Suspension Clause.

Although the discussion was therefore directed to a somewhat different issue from the one presented here, it demonstrates that the framers of the Constitution were concerned with the power, which had been exercised repeatedly in England, to effect a complete suspension of the privilege of the writ. It was just such a total denial of any remedy for unjust detention that the framers had in mind when they drafted the Suspension Clause. They had no thought of defining the scope of the writ or prescribing the procedural details for its issuance, nor did they concern themselves with the nature of any tribunal to be established to entertain applications for the writ. Those matters they left to Congress. And, since the First Judiciary Act, Congress has repeatedly acted on the assumption that it has the power to regulate procedures in habeas corpus, to define the grounds for issuance of the writ, and to prescribe the jurisdiction of the federal courts to issue it. There is no support for the view that the privilege of the writ was understood to include access to an Article III court for its issuance.

In sum, we share Judge Robb's view of this aspect of the question (Pet. App. 51a):

> If without the dilution of his constitutional rights a man may be tried and sentenced to the penitentiary by an Article I judge of the Superior Court, I see no reason why he may not be limited to that same court when applying for collateral post-conviction relief. A prisoner's constitutional rights are no more diluted and he is no more disadvantaged in the one case than in the other. In both cases review may be had in the United States Supreme Court. The Article I courts held competent to administer the District of Columbia's criminal justice system exclusive of Article III courts are perforce competent to dispense collateral post-conviction relief exclusive of the habeas corpus jurisdiction of Article III courts.

2. The Suspension Clause does not prohibit Congress from restricting the availability of habeas corpus as a means of collaterally attacking a judgment of conviction entered by a court of competent jurisdiction

Even if the privilege of the writ of habeas corpus were viewed as compelling the availability of an Article III tribunal for the adjudication of applications for the writ, the Constitution's history shows that the framers did not understand the privilege to extend to collateral attacks upon criminal convictions. Accordingly, limitations upon the nature and scope of post-conviction collateral relief do not implicate the Suspension Clause.

At the time the Constitution was adopted, the rule at common law was that "once a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court." Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich.L.Rev. 451, 468 (1966). As this Court stated in *United States* v. *Hayman*, *supra*, 342 U.S. at 210-211:

> Although the objective of the Great Writ long has been the liberation of those unlawfully imprisoned, at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal. Such a judgment prevented issuance of the writ without more.[32]

The early decisions of this Court reflected a similar understanding. See *Ex parte Watkins*, 3 Pet. 193, 202-203; *Ex parte Watkins*, 7 Pet. 568, 574; *Ex parte Yerger*, 8 Wall. 85, 101; see also *Frank* v. *Mangum*, 237 U.S. 309, 329-331.

We do not here undertake to recapitulate the recent scholarship concerning the common-law scope

[32] The rule was the same under the Habeas Corpus Act of 1679, 31 Car. II, c. 2, which governed the availability of the writ and its procedural aspects at the time of the United States Constitution. That Act expressly excepted from those eligible to apply for the writ "persons convict or in execution by legal process" (Section III). State legislation in the United States at about the time of the Constitutional Convention was generally patterned on the English Act (see Addendum A, *infra*, pp. 14a-15a).

of the writ and its historical development in England and the United States.[33] It is enough to note that the scholarly consensus accords with our view that the privilege of the writ of habeas corpus that the framers meant to protect from suspension did not entitle a prisoner in custody pursuant to a sentence imposed by a court of competent jurisdiction to obtain a collateral review of the validity of his conviction.[34]

Although Congress has by statute made such collateral review available in specified circumstances, it could, without violating the prohibition of the Suspension Clause, wholly eliminate the availability of collateral review in the federal courts, by habeas corpus or otherwise, of any conviction entered by a court of competent jurisdiction. As Judge Friendly has stated: "It can scarcely be doubted that the writ protected by the suspension clause is the writ known to the framers, not as Congress may have chosen to

[33] See, *e.g.*, Oaks, *Legal History in the High Court—Habeas Corpus, supra;* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv.L.Rev. 441 (1963); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian,* 33 U.Chi.L.Rev. 31 (1965); Note, *Developments in the Law—Federal Habeas Corpus,* 83 Harv.L.Rev. 1038 (1970). See also Hart and Wechsler, *The Federal Courts and the Federal System,* Chap. X, pp. 1424-1538 (2d ed. 1973).

[34] To the extent that the Court's opinion in *Fay* v. *Noia*, 372 U.S. 391, may be said to reflect a different view of the scope of the writ at the time of the Constitution, the correctness of its historical analysis has been called seriously into question. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 252-256 (Mr. Justice Powell concurring).

expand it or, more pertinently, as the Supreme Court has interpreted what Congress did." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 170 (1970).

In contrast, the premise of respondents' Suspension Clause argument is that, whatever the provision may have meant when adopted, Congress may not withdraw any aspect of the privilege once it has been extended by statute (see Pet. App. 17a). Under that theory, the Suspension Clause functions as a constitutional ratchet, permitting Congress to expand the availability of the writ but then constitutionalizing each such expansion and putting it beyond the reach of subsequent legislative contraction. There is absolutely no reason to suppose that the framers intended that result, and the result is not jurisprudentially sound. An argument similar to respondent's was recently rejected in *United States* v. *MacCollom*, No. 74-1487, decided June 10, 1976, slip op. 5 (plurality opinion).

Of course, Congress has not here abolished the statutory right to a post-conviction review of Superior Court convictions, and the Court therefore need not reach the question whether Congress could properly do so. Section 110 goes no further than to channel all such collateral challenges to the sentencing court. If this amounts to a "dilution" of the privilege that respondents contend was previously extended under 28 U.S.C. 2241, *et seq.*, it is a dilution only in terms of forum and not at all in terms of scope, and it relates only to post-conviction remedies.

If the Court is not "imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries" (*Schneckloth* v. *Bustamonte*, 412 U.S. 218, 256, Mr. Justice Powell concurring), even less should it be imprisoned by "every particular" of the writ as it has been extended by subsequent Congressional enactments. Those legislative expansions do not "liberate us from all historical restraint" (*ibid.*) in applying the Suspension Clause of the Constitution. Thus, even if the clause would not permit a complete abolition of post-conviction federal habeas corpus relief, it could surely tolerate a shift in the forum available for such relief from an Article III to an Article I federal court.

B. Section 110 Does Not Deny Equal Protection to Persons Convicted of Criminal Offenses in the Superior Court

The court of appeals suggested that Section 110 may be said to raise equal protection problems by discriminating against the class of persons convicted of criminal offenses in the Superior Court. The argument apparently is that the statute impermissibly disfavors that class by depriving its members of access to an Article III forum for adjudication of post-conviction collateral attacks on their sentences, while allowing such access under 28 U.S.C. 2254 and 2255 to persons convicted of criminal offenses in state courts and in other federal courts.

The concept of equal protection, however, does not encompass a right to litigate claims in any particular tribunal. See, *e.g.*, *Missouri* v. *Lewis*, 101 U.S. 22,

30-32; *Duncan* v. *Missouri*, 152 U.S. 377, 382-383; *Mallett* v. *North Carolina*, 181 U.S. 589, 597-599. As this Court stated in an analogous context, "[i]t is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail." *Cincinnati Street Railway Co.* v. *Snell*, 193 U.S. 30, 37. Equal laws prevail in the Superior Court and the United States District Courts, for the collateral remedy provided by Section 110 is substantially identical to that available under 28 U.S.C. 2254 and 2255, and that remedy provides adequate and effective procedures to test the legality of a detention.

Moreover, respondents' argument assumes that an Article III forum is materially preferable to an Article I federal forum for the adjudication of post-conviction collateral attacks. As we have already shown, however, the tenure and salary differences between the two court systems have no impact on the substantive scope and quality of the procedural remedy available in the two courts. In both instances the courts are federal courts, and the judges are federal judges, appointed by the President and confirmed by the Senate, who apply and interpret laws enacted by Congress.

Thus, any person in custody under a sentence imposed by a court—whether it is a federal district court, a state court, a territorial court, or the Superior Court of the District of Columbia—has available to him in a federal forum a post-conviction remedy in the nature of habeas corpus. If he was sentenced by a federal court, his remedy lies in the sentencing court. If he was sentenced in a state court, his remedy (after exhaustion of available state remedies) lies in an appropriate federal district court. Each relevant class of convicted persons is thus accorded equivalent treatment, and none is invidiously discriminated against.

Although persons convicted in the Superior Court or one of the territorial courts are limited to an Article I tribunal for their collateral post-conviction remedy, the different status of the available federal forum is a consequence of the underlying Congressional determination to establish an Article I court system for the trial of criminal cases. That determination leads unavoidably to the creation of a special class of federal prisoners in custody under sentences imposed by an Article I court. Any post-conviction remedy for that class of prisoners would perforce place them in a position somewhat different from that of other prisoners.

Here, Congress chose to follow the model of Section 2255, and respondents claim that the result is to deprive them of the access to an Article III tribunal that other prisoners are afforded. But to provide, as respondents contend Congress must, that members of their class may bring both a motion for collateral relief in the Article I sentencing court and, if that is unsuccessful, a subsequent application for a writ of habeas corpus in an Article III district

court would give to the members of their class more than is given to the members of any other class—the opportunity to present their collateral claims to two different federal court systems. Other federal and state prisoners who are permitted to present their collateral claims to only a single federal court system would in that case have an equal protection argument analogous to the one presented by respondents.

In our view Congress may, consistent with the Due Process Clause of the Fifth Amendment, properly choose either to provide D.C. Code convicts with a post-conviction forum in the United States District Court or to confine them to a remedy in the sentencing court, on the model of Section 2255. Just as Congress was authorized, in the exercise of its plenary power "to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment" (*Palmore* v. *United States, supra,* 411 U.S. at 408), to establish an Article I District of Columbia court system with jurisdiction over the trial of criminal cases arising under the provisions of the D.C. Code, so too was it authorized to provide that persons convicted of such offenses in that court system may collaterally challenge their convictions only by motion in those courts.

Moreover, the fact that Congress in 28 U.S.C. 2254 has provided state prisoners an avenue for post-conviction collateral attacks in federal district court does not mean that it must do the same for persons under sentence of an Article I federal court. In the

case of state prisoners, Congress exercises no control over the nature and scope of post-conviction remedies, if any, that may be made available to entertain claims that a conviction was procured in violation of the Constitution or laws of the United States. In the case of prisoners convicted in either the District of Columbia local courts or the territorial courts, Congress has prescribed a comprehensive post-conviction remedy as broad as that available to other federal convicts. Accordingly, it is plainly not unreasonable for Congress to determine that there is a need to provide post-conviction federal court remedies for state prisoners, while at the same time determining that it is unnecessary to duplicate for District of Columbia and territorial convicts the system of post-conviction review that it has furnished to them in the Article I courts.

Congress has provided only one post-conviction review forum for all other convicts, both state and federal, and equal protection principles do not oblige it to afford D.C. Code convicts two separate federal forums for their collateral claims.

Finally, the utility of Section 110(g) in the context of the Court Reform Act makes it clear that, even if the affected class of prisoners may be said to be perceptibly disadvantaged in comparison with some other prisoners, that characteristic of the system constructed by Congress is a wholly reasonable one. Section 110 serves not only to avoid having district courts in various parts of the country reviewing Superior Court judgments in criminal cases

involving D.C. Code offenses (see pp. 47-48, *supra*), but also to assure that the purposes of court reorganization in the District of Columbia are not defeated through the substantial expansion of the caseload of the general federal courts that would result if prisoners were free to file in the district court collateral challenges to sentences imposed by the Superior Court (see pp. 38-40, *supra*).[35]

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[35] The court of appeals stated that "there is a similar second classification involving prisoners *within* the District which poses equal protection problems" (Pet. App. 26a; emphasis in original). The court was referring to the different treatment accorded under the Act to pre-trial applications for writs of habeas corpus (which may in certain circumstances be filed in the United States District Court) and post-conviction collateral attacks (which may be brought only in the sentencing court). But even if this different allocation of judicial jurisdiction presents an equal protection issue (see pp. 67-68, *supra*), the two classes involved are not similarly situated and therefore need not be treated identically. Congress may reasonably provide different procedures and a different forum to test the legality of a detention under executive authority than to test a detention under authority of a judicial judgment of conviction in a criminal case. Indeed, the historical basis for such a distinction (see pp. 64-65, *supra*) would itself fully justify such a legislative classification.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDUM A

Excerpt from Brief for the United States, pp. 61-80, in *United States* v. *Hayman*, 342 U.S. 205

SECTION 2255 IS NOT A SUSPENSION OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS WITHIN THE MEANING OF ART. I, SECTION 9, OF THE CONSTITUTION

A. THE CONSTITUTION GIVES CONGRESS BROAD POWER TO REGULATE THE JURISDICTION OF FEDERAL COURTS TO ISSUE WRITS OF HABEAS CORPUS AND THE PROCEDURE UPON SUCH WRITS

The majority of the court below appears to have regarded the constitutional guaranty against suspension of the writ of habeas corpus as fixing immutably various details of habeas corpus procedure as it existed in 1789. The framers of the Constitution, in this area as in others, carefully avoided placing the law in any such strait-jacket. Their concern was to guard against the denial of any remedy to one unlawfully detained, not to prescribe procedural details. This is clearly shown by the discussions attending the adoption of Article I, § 9, of the Constitution, the historical evils at which that provision was aimed, the subsequent practice of Congress in prescribing the scope of and procedure on habeas corpus, and the uniform course of judicial decision recognizing the validity of that practice.

The only mention of the writ of habeas corpus in the Constitution is the provision of Article I, § 9, cl. 2, that:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The discussions attending the adoption of this provision illustrate the breadth of the framers' objective. Charles Pinckney offered the following motion to the constitutional convention (5 Elliot's *Debates* 445):

> The privileges and benefit of the writ of *habeas corpus* shall be enjoyed in this government in the most expeditious and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding — months.[41]

When Pinckney's motion came up for discussion, Madison's notes contain the following entries (5 Elliot's *Debates* 484):

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[41] Pinckney's draft was apparently taken from the Massachusetts Constitution of 1780 which provided (c. 6, art. 7): "The privilege and benefit of the writ of *habeas-corpus* shall be enjoyed in this Commonwealth in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months." The New Hampshire Constitution of 1784 contained a similar provision with suspension limited to three months. The Georgia Constitution of 1777 provided: "The principles of the habeas corpus act shall be a part of this constitution." No other constitution in force at the time of the convention referred to the writ, although some contained provisions against the suspension of statutes generally.

> Mr. Rutledge was for declaring the *habeas corpus* inviolate. He did not conceive that a suspension could ever be necessary, at the same time, through all the states.
>
> Mr. Gouverneur Morris moved, that "the privilege of the writ of *habeas corpus* shall not be suspended, unless where, in cases of rebellion or invasion, the public safety may require it."
>
> Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with judges, in most important cases, to keep in gaol or admit to bail.

The Morris motion carried. All agreed to the part reading: "The privilege of the writ of *habeas corpus* shall not be suspended"; North Carolina, South Carolina, and Georga voted against the "unless" clause. Subsequently the word "where" was changed by the committee on style to read "when," and the provision became part of the Constitution.

The provision thus adopted was in negative form; it did not affirmatively declare the right of an imprisoned person to the writ. Four of the state ratifying conventions, apparently deeming this inadequate, proposed the inclusion in a bill of rights, to be added to the Constitution, of an affirmative guaranty of the privilege of habeas corpus. The New York convention proposed the following (1 Elliot's *Debates* 328):

> That every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed, except when, on account of

public danger, the Congress shall suspend the privilege of the writ of *habeas corpus.*

Virginia (3 *id.* 658), North Carolina (4 *id.* 243), and Rhode Island (1 *id.* 334) suggested the following (with slight variations in punctuation):

> That every freeman restrained of his liberty is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed.

However, when the First Congress proposed a bill of rights consisting of twelve amendments to the Constitution, of which ten were later ratified, none of the proposed amendments was concerned with the writ of habeas corpus.

The foregoing clearly indicates, we think, that the framers of the Constitution were concerned merely with assuring the availability of *some* remedy for persons unlawfully detained, and that they had no thought of prescribing the procedural details of that remedy. The evils at which the clause was evidently directed bear this out. Despite the common law decisions and statutes establishing the writ in England, the Crown had on numerous occasions succeeded in frustrating all inquiry into the cause of any remedy for unjust detention that the framers had in mind in prohibiting suspension of the writ.[42]

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[42] For the creation and development of the writ in England, and for examples of its suspension or frustration, see Church, *Habeas Corpus* (2d ed. 1893); Hurd, *Habeas Corpus* (2d ed. 1876); 9 Holdsworth, *History of English Law,* 112 *et seq.*

Although the origins of the writ in England are somewhat obscure, it had by the 17th Century become established as the appropriate process for checking illegal imprisonment by public officials or inferior courts. In *Darnel's Case,* 3 How. St. Tr. 1 (1627), the court held that the command of the King (*per special mandatum regis*) in the form of a warrant of arrest signed by two members of the privy council, was a sufficient answer to the writ, against defense objections that even the privy counsel had to assign a sufficient cause of commitment. Section 5 of the Petition of Right, 3 Car. I, c. 1 (1627) to which the King consented in return for certain financial considerations, reflects the concern which this decision caused; it recited that contrary to the Great Charter and good laws and statutes of the realm, divers of the King's subjects had "of late been imprisoned without any sense" shown, and when they were brought up on habeas corpus, no cause was shown but the special command of the King, yet they were nevertheless remanded to prison. It was therefore prayed that "no freeman, in any such manner as is before-mentioned [shall] be imprisoned or detained." Subsequently an act of 1640, abolishing the Star Chamber, 16 Car. I, c. 10, specifically authorized use of the writ to test the legality

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(1932); 2 Hallam, *History of the Middle Ages,* Chapter 8 (1862); Glass, *Historical Aspects of Habeas Corpus,* 9 St. Johns L. Rev. 55 (1934); Jenks, *The Story of the Habeas Corpus,* 18 L.Q.Rev. 64 (1902); Longsdorf, *Habeas Corpus A Protean Writ and Remedy,* 8 F.R.D. 179.

of commitments by command or warrant of the King or privy council."[43]

The Habeas Corpus Act of 1679, 31 Car. II, c. 2, definitely established the availability of the writ and fixed its procedural aspects for the next 131 years. Examination of the provisions of this Act, which was hailed as a great landmark of liberty, forcefully illustrates the narrow scope of the rights protected by the writ in the 17th and 18th centuries as compared with modern conceptions of it. The Act was available only to persons held on charge of crime (Sec. III).[44] Upon issuance of the writ and the return thereto the prisoner was entitled to be released upon giving appropriate recognizances to appear at the next term at a court where the offense with which he was charged was properly cognizable, unless it appeared that the offense was not bailable (Sec. III). Persons charged with treason or felony "plainly and specially expressed in the warrant of commitment" were not eligible to apply for the writ; they were, however, guaranteed the right to be indicted at the next succeeding session (or the second succeeding session if the Crown's witness could not be ready sooner) or bailed (Sec. VII). "Persons convict or in execution by legal

[43] The colonists were familiar with these events; the arguments in *Darnel's Case* were printed in pamphlet form and circulated in the colonies. Hurd, *Habeas Corpus* (2d ed., 1876), pp. 101-102).

[44] Persons imprisoned for debt were expressly excepted (Sec. VIII).

process" were altogether excluded from the benefits of the Act (Sec. III). Within these limits the Act made important procedural advances. The writ could be issued in term time or vacation by any superior court judge (i.e., the Chancellor, any Justice of King's Bench or Common Pleas, and the barons of the Exchequer) (Sec. III).[45] Times were set forth within which the return was to be made and the writ adjudicated (Sec. III). Any sheriff or other jailer who refused to comply with the writ was subject to punishment (Sec. V). Any judge who unlawfully denied a writ was subject to a large forfeiture to the person aggrieved (Sec. X).

The provisions of this Act were, however, suspended on numerous occasions by act of Parilament which had the effect of making 31 Car. II, c. 2, temporarily inoperative, usually as to a limited class of persons such as those suspected of treason against the King. Thus, the Habeas Corpus Act was suspended because of conspiracies against the King in 1688 (1 Wm. & Mary I, c. 2, 7, 19) and again in 1696 (7 & 8 Wm. III, c. 11). Activities of the Jacobites resulted in suspension in 1714 (1 Geo. I, st.

[45] Previously only the Chancellor and the judges of King's eBnch had had the undoubted right to issue the writ. Hurd, *Habeas Corpus* (2d ed. 1876) 96. And these judges were either unable or unwilling to issue the writ except during the legal term, which lasted about six months of every year. For example, in *Jenkes' Case*, 6 How. St. Tr. 1190, the chancellor refused the writ in vacation to a man committed by the King in council for making a speech advocating the calling of a new Parliament.

2, c. 8, 30), 1722 (9 Geo. I, c. 1), and 1744 (17 Geo. II, c. 6). See *King* v. *Earl of Orrery*, 88 Eng. Rep. 75 (1722)). The American Revolution caused suspension as to persons suspected of treason or piracy. 17 Geo. III, c. 9; 18 *id.*, c. 1; 19 *id.*, c. 1; 20 *id.*, c. 5; 21 *id.*, c. 2; 22 *id.*, c. 1; see 2 *Works of Edmund Burke* 1-42.

Suspension occasionally amounted to bills of attainder and named specific individuals. Thus, the act was suspended as to six named individuals arrested as conspirators in a plot to assasinate William III in 1696. 7 & 8 Wm. III, c. 11. Other statutes authorized later rulers to continue the detention. 8 Wm. III, c. 5; 9 Wm. III, c. 4; 10 & 11 Wm. III, c. 13; 1 Ann., st. 1, c. 29; 1 Geo. I, st. 2, c. 7; 1 Geo. II, st. 1, c. 4; *Case Against Bernardi*, 13 How. St. Tr. 759.[46]

The statute 17 Geo. III, c. 9 (1777), *supra*, will serve as an example of a suspension act. It provided:

> * * * That all and every person or persons who have been, or shall hereafter be seized or taken in the act of high treason committed in any of his Majesty's colonies or plantations in *America*, or on the high seas, or in the act of piracy, or who are or shall be charged with or suspected of the crime of high treason, * * * or of piracy, * * * may be thereupon secured and detained in safe custody, without bail or mainprize, until the first day of *January*, one thousand seven hundred and seventy-eight; and that

[46] The last survivor of the six died in Newgate in 1736. *Looking Back*, 91 Sol. J. 515 (1947).

> no judge or justice of the peace shall bail or try any such person or persons without order from his Majesty's most honorable privy council * * *, any law, statute, or usage, to the contrary in any-wise notwithstanding.

This suspension was extended annually until January 1, 1883, see p. 68, *supra*. In other words, suspension in England was a legislative enactment which caused the Habeas Corpus Act to cease to operate, allowing confinement without bail, indictment, or other judicial process.

A similar suspension occurred in Massachusetts shortly before the Constitutional Convention. During Shay's Rebellion in 1786-1787, the Massachusetts legislature suspended the privilege of the writ. The statute provided that "any person or persons whatsoever, whom the Governor and Council, shall deem the safety of the Commonwealth requires" would be "continued in imprisonment, without Bail or Mainprize, until he shall be discharged therefrom by order of the Governor, or of the General Court." Mass. Laws 1786, c. 41.[47]

In short, as the debates in the Convention indicate (see *supra*, pp. 62-64), the concern of the framers was over the power, which had been repeatedly exercised in England, to effect a total suspension

[47] For general discussions of the writ in the colonies see 2 Channing, *History of the United States* 221, n. 1 (1937); Goebel, *Law Enforcement in Colonial New York* 260, 288, 502-506 (1944); Hurd, *Habeas Corpus* 95-104 (2d ed. 1876); Glass, *Historical Aspects of Habeas Corpus*, 9 St. Johns L. Rev. 55, 63-64 (1934).

of the privilege of the writ. The purpose of the clause was to provide that such a total suspension could occur only in time of war or rebellion and then only if the public safety required it.[48]

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[48] This power to suspend the privilege in time of war or rebellion has several times been exercised or sought to be exercised. In 1807, after the exposure of the Burr conspiracy, Jefferson proposed a suspension of the writ for three months in cases of treason or other high crime or misdemeanor. The measure passed the Senate with one dissent but was defeated in the House. See 16 *Annals of Congress*, 44, 402 *et seq.*, 531-535; 3 Beveridge, *Life of John Marshall*, 343-348. Lincoln, without legislative authority, suspended the writ or authorized its suspension on several occasions early in the Civil War. See 6 Richardson, *Messages and Papers of the Presidents*, 16-19, 24-25, 98-99; *Ex Parte Merryman*, Fed. Cas. No. 9,487 (C.C.D. Md.). In 1863 Congress authorized suspension of the writ; the Act (Act of March 3, 1863, 12 Stat. 755) provided that:

"* * * during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ, so long as said suspension by the President shall remain in force, and said rebellion continue."

The privilege of the writ was also suspended in the Confederacy. *In re Cain*, 60 N.C. 525, 2 Winston 141; *State* v. *Sparks*, 27 Tex 705.

[Footnote continued on page 11a]

Congress has repeatedly acted on the assumption that it has power to regulate procedure in habeas corpus, to define the grounds for issuance of the writ, and to prescribe the jurisdiction of federal courts to issue it. The Judiciary Act of 1789, Sec. 14, 1 Stat. 81, contained the following brief provision, intended to provide "efficient means by which this great constitutional privilege should receive life and activity" (*Ex Parte Bollman*, 4 Cranch 75, 95):

> *And be it further enacted*, That all the beforementioned courts of the United States, shall have the power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some

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[48] [Continued]

The Act of April 20, 1871, gave the President the power to suspend the writ in an attempt to combat the Ku Klux Klan. 17 Stat. 13. For a time in the fall of 1871, the privilege was denied in nine South Carolina counties. 7 Richardson, *Messages and Papers of the Presidents*, 136-138, 150-151. The writ was suspended in Cavite and Batangas in 1905. *Fisher* v. *Baker*, 203 U.S. 174. It was suspended in Hawaii in 1941. *Duncan* v. *Kahanamoku*, 327 U.S. 304.

court of the same, or are necessary to be brought into court to testify.

This provision clearly prohibited inquiry into the cause of detention of prisoners confined under state process. *Ex parte Dorr*, 3 How. 103. The availability of the writ was extended in 1833 to federal officers in state custody for acts in carrying out federal laws (Act of March 2, 1833, 4 Stat. 632, 634; see *In re Neagle*, 135 U.S. 1), and in 1842 to certain foreign nationals held by state officers (Act of August 28, 1842, 5 Stat. 539).

In 1867, to facilitate enforcement of the Reconstruction Acts (2 Warren, *The Supreme Court in United States History* (rev. ed.), 464), the federal writ was drastically extended to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States." Act of February 5, 1867, 14 Stat. 385. In this Act Congress for the first time made detailed regulations of the procedure on all applications for the writ. By the Act of March 27, 1868, 15 Stat. 44, Congress temporarily withdrew the jurisdiction of the Supreme Court to hear appeals from denials of the writ. See *Ex parte McCardle*, 7 Wall. 506. The provisions of the 1867 Act were codified in the Revised Statutes of 1874 and 1878. This statutory framework remained substantially unchanged (with the exception of some modifications in the appellate procedure) (see 28 U.S.C. (1946 ed.) 451-466), until the revision and enactment of Title 28 in 1948.

The power of Congress thus to prescribe the attributes of the writ has never been doubted. The principle was laid down by Chief Justice Marshall in *Ex parte Bollman*, 4 Cranch 75, 94, that "the power to award the writ by any of the courts of the United States, must be given by written law"—i.e., by statute.[49] This holding has been adhered to without exception. *E.g.*, *Ex parte Dorr*, 3 How. 103; *Ex parte McCardle*, 7 Wall. 506; *Whitney* v. *Dick*, 202 U.S. 132; *Ahrens* v. *Clark*, 335 U.S. 188; *Dorr* v. *Burford*, 339 U.S. 200, 210-214. Similarly, the power of Congress to regulate habeas corpus procedure has never been questioned. E.g., *Frank* v. *Mangum*, 237 U.S. 309, 331; *Johnson* v. *Zerbst*, 304 U.S. 458; *Walker* v. *Johnston*, 312 U.S. 274. As this Court said of the issue before it in *Walker* v. *Johnston*, *supra*, 312 U.S. at 285:

> It is not a question of what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which R. S. 761 is derived was adopted by Congress. The question is what the statute requires.

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[49] Marshall excepted from this statement the inherent powers of courts "over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions."

B. IN THE EXERCISE OF THAT POWER CONGRESS COULD, IN THE CASE OF CONVICTED PERSONS, VALIDLY SUBSTITUTE FOR HABEAS CORPUS A REMEDY IN THE SENTENCING COURT

Any suggestion that the Constitution imposed an inflexible procedure on habeas corpus, or adopted the act of 31 Car. II, c. 2, is not only textually and historically unsound, but also self-defeating as applied to the remedies available to attack a judgment of conviction. For it is clear that at the time of the Constitution habeas corpus was never conceived of as a remedy available to persons convicted by a court of general criminal jurisdiction. The English Act of 1679, 31 Car. II, c. 2, which was in force in England in 1789, expressly excepted "persons convict or in execution by legal process" from those eligible to apply for the writ. (Sec. III; see p. 67, *supra.*) Similarly at common law the rule that a convicted person did not have the privilege of the writ had been applied. See Dicey, *Law of the Constitution*, 217-218.

State legislation in the United States at about the time of the Convention was generally patterned on the English Act. See 2 Kent, *Commentaries* 28. Typically the state acts likewise expressly excluded convicted persons from their benefits. See Maryland, Act of Jan. 6, 1810, ch. cxxv ("not being convict or in execution by legal process"); Massachusetts, Laws, 1784, c. 72 ("persons convict or in execution by legal process"); New Hampshire, Act of June 26, 1815, c. 45 ("unless the complainant be convict, or in execution by legal process, criminal or civil"); New

Jersey, Act of Mar. 11, 1795, c. dxxxvi ("other than persons convict, or in execution by legal process"); New York, Laws of 1801, c. 65 ("other than persons convict or in execution by legal process").[50]

In the federal courts, under acts of Congress prior to that of 1867, it was the settled rule that a showing that the applicant was held pursuant to a conviction by a court of general criminal jurisdiction ended the inquiry. Once the jurisdiction of the court over criminal matters was shown, its decision was deemed *res judicata* as to all matters affecting the validity of the conviction and sentence. *Ex parte Watkins*, 3 Pet. 193; *Ex parte Watkins*, 7 Pet. 568, 571; see *Ex parte Yerger*, 8 Wall. 85, 101; *Frank* v. *Mangum*, 237 U.S. 309, 330-331. Although the Court is not faced with any such question, the fact that the writ of habeas corpus as it existed when the Constitution was adopted did not extend to convicted criminals indicates that even the complete abolition of the right to the writ for such persons would not be a suspension in contravention of Article I, clause 9.

The Act of 1867, 14 Stat. 385, was, however, the basis for drastic expansion in the scope of inquiry on the writ. That Act contained two provisions of primary significance for present purposes. It provided that federal courts and judges

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[50] As to Georgia, see note 41, p. 62, *supra*, and *State* v. *De Las Maurignos*, T.U.P. Charlton Rep. 24 (1805) which states that the "habeas corpus act, 31 Carolus 2. chap. 2, sec. 7, * * * is adopted by our constitution and our laws * * *."

> in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States.

In addition, it made a major change in habeas corpus procedure by providing that "the petitioner may deny any of the material facts set forth in the return, or may allege any fact * * *" and that the court or judge "shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested." This Court described the change made by the latter provision in *Frank* v. *Mangum, supra,* at 330-331:

> The effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to "dispose of the party as law and justice require."

These provisions of the 1867 Act, together with a growing concern of this Court for the procedural guaranties of due process in criminal cases, became the basis for a series of holdings that, where denial of constitutional right was asserted, judgments of conviction by state and federal courts could be reexamined on habeas corpus, and evidence outside

the original criminal record could be taken on the question whether constitutional rights had been violated. *Moore* v. *Dempsey,* 261 U.S. 86; *Mooney* v. *Holohan,* 294 U.S. 103; *Johnson* v. *Zerbst,* 304 U.S. 458; *Walker* v. *Johnston,* 312 U.S. 275; *Waley* v. *Johnston,* 316 U.S. 101; *Adams* v. *United States ex rel. McCann,* 317 U.S. 269; *House* v. *Mayo,* 324 U.S. 42; *Von Moltke* v. *Gillies,* 332 U.S. 708; *Price* v. *Johnston,* 334 U.S. 266.

Thus the decisions on which respondent necessarily relies in his claim for relief from his criminal conviction stem, not from any command of Art. I, Sec. 9 of the Constitution, but from the jurisdiction conferred and procedure created by the 1867 Act. See *Johnson* v. *Zerbst, supra,* at 466; *Walker* v. *Johnston, supra,* at 285-6. To the extent that they may have constitutional basis it would rest in an implication from the due process clause that where a conviction has been rendered in violation of constitutional right some corrective process must be supplied. Thus in *Johnson* v. *Zerbst, supra,* at 467, this Court deemed it necessary that the writ should issue because

> no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by *habeas corpus.*

And in *Waley* v. *Johnston, supra,* at 104-105, this Court emphasized that

> use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judg-

> ment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, *and where the writ is the only effective means of preserving his rights.* [Emphasis added.]

In short, habeas corpus developed as a remedy in these cases because the language of the 1867 Act permitted it and because, in the absence of any other remedy, it appeared to b the only means of preserving constitutional rights. We think there can be no doubt of the power of Congress to replace habeas corpus in this area with a substitute remedy of equivalent scope in the sentencing court. The reasons which impelled Congress to the change are clearly set forth in the materials already quoted from the Judicial Conference. See *supra*, pp. 16-31. And we think the discussion in Part I of this Brief amply shows that the new remedy affords an adequate means of redressing any violation of constitutional right.

This Court dealt with a similar question in cases coming from state courts. In various types of situations a number of states, while denying relief in habeas corpus, permit a prisoner to attack his conviction in the sentencing court by writ of error or proceeding *coram nobis*.

This Court has invariably stated or assumed that such a remedy in the sentencing court, if clearly available, satisfies a state's obligation to provide an

adequate corrective process for any denial of constitutional right occurring in a criminal trial. E.g., *New York ex rel. Whitman* v. *Wilson*, 318 U.S. 688; *Ex parte Hawk*, 321 U.S. 114; *Marino* v. *Ragen*, 332 U.S. 561; *Young* v. *Ragen*, 337 U. S. 235; *Darr* v. *Burford*, 339 U. S. 200. It has recognized that "of course [a state] may choose the procedure it deems appropriate for the vindication of federal rights." *Young* v. *Ragen*, *supra*, 337 U. S. at 238. We believe it was clearly open to Congress to make a similar choice with respect to federal proceedings, and to avoid the unseemly spectace of a trial by one district court of the validity of proceedings in another district court (*supra*, p. 25), by substituting for habeas corpus a remedy of equivalent scope in the sentencing court.

There can be no doubt that even within the area to which the writ traditionally applies, Congress has complete power to specify the court in which relief from a conviction can be obtained. This is clearly established by *Ahrens* v. *Clark*, 335 U.S. 188, in which this Court construed the habeas corpus statutes as confining jurisdiction to issue the writ for that purpose to the court within whose district the prisoner is held. Although there was strenuous dissent to a construction of the statute which, in the views of the minority, resulted in a "serious contraction of the availability of the writ" (335 U.S., at 194), no question was raised by any member of the court as to the power of Congress to impose such a jurisdictional limitation. See also

Whitney v. *Dick*, 202 U.S. 132, construing the statutes as denying jurisdiction to circuit courts of appeals to issue writs of habeas corpus except in aid of an existing jurisdiction. If Congress can confine the issuance of the writ to a single court, we see no reason why it could not choose the sentencing court rather than the court of the district within which the prisoner is confined. *A fortiori*, in dealing with an area in which habeas corpus was not available at the time the Constitution was adopted, Congress had power to substitute for habeas corpus a remedy to substitute for habeas corpus a remedy of equivalent scope in the sentencing court.[51]

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[51] In other contexts, this Court has sustained legislation confining to a single tribunal the opportunity to assert constitutional issues. E.g., *Lockerty* v. *Phillips*, 319 U.S. 182, 186-8; *Yakus* v. *United States*, 321 U.S. 414, 443-8.

ADDENDUM B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. *Constitutional Provisions*

Article I, Section 8 of the Constitution provides in pertinent part:

> The Congress shall have Power * * *
>
> * * * *
>
> [cl. 9] To constitute Tribunals inferior to the supreme Court;
>
> * * * *
>
> [cl. 17] To exercise exclusive Legislation in all Cases whatsover, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *.

Article I, Section 9, cl. 2 provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Article III, Section 1 of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as th eCongress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offies during good Behavior, and shall, at stated Times, receive for their Services, a Com-

pensation, which not be diminished during their Continuance in Office.

Article III, Section 2 of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. *United States Code Provisions*

28 U.S.C. 2241 provides in pertinent part:

§ 2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is

committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an ait done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validty and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. 2243 provides in pertinent part:

§ 2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

* * * *

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

* * * *

28 U.S.C. 2254 provides in pertinent part:

§ 2254. State custody; remedies in State courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the ex-

istence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by any application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his

constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in sucs State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

* * * *

28 U.S.C. 2255 provides:

§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also

appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

3. *District of Columbia Code Provision*

23 D.C. Code 110 provides:

(a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Cloumbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

(b) A motion for such relief may be made at any time.

(c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that (1) the judgment was rendered without jurisdiction, (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, (3) there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner, resentence him,

grant a new trial, or correct the sentence, as may appear appropriate.

(d) A court may entertain and determine the motion without requiring the production of the prisoner at the hearing.

(e) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

(f) An appeal may be taken to the District of Columbia Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL.,
PETITIONERS

v.

ROOSEVELT F. PALMORE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO VACATE AND REMAND

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO VACATE AND REMAND

Petitioners move that the judgment of the court of appeals in *Palmore* be vacated and that the case be remanded to that court for further consideration in light of *Stone* v. *Powell,* No. 74-1055, decided July 6, 1976.

On February 23, 1976, this Court granted the government's petition in No. 75-811 for writs of certiorari to review two separate *en banc* judgments of the court of appeals, one in *Palmore* and the other in *Pressley.* The petition presented a single question: "Whether the federal district courts have jurisdiction to entertain habeas corpus petitions by persons convicted of violations of the District of Columbia Code in the Superior Court of the District of Columbia." Respondents Palmore and Pressley had each filed a post-conviction application for a writ of habeas corpus in the United States District

Court for the District of Columbia, challenging his criminal sentence imposed by the Superior Court of the District of Columbia.

Palmore's application raised a Fourth Amendment issue. He contended that a pistol seized from the car in which he was driving when stopped by the police should not have been admitted in evidence at his trial because it was discovered as a result of an allegedly unlawful search.[1] Palmore's Fourth Amendment contention had been considered and rejected both by the trial court and on appeal by the District of Columbia Court of Appeals (290 A. 2d 573). This Court had thereafter denied certiorari with respect to that issue (411 U.S. 389, 396-397 and n. 6).

In the federal habeas corpus proceeding, the district court dismissed Palmore's application on jurisdictional grounds, but the court of appeals reversed and remanded for a decision on the merits of Palmore's Fourth Amendment contentions. The court of appeals' jurisdictional holding rested in large part on its view that the District of Columbia court system under the Court Reform Act should be viewed as "analogous to the relationship between the federal and state courts" (Pet. App. 33a).

After the petition for certiorari was granted with respect to both *Palmore* and *Pressley*, this Court decided *Stone* v. *Powell*, *supra*, which held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconsti-

[1]Pressley's habeas corpus application raised a Sixth Amendment issue, alleging that he had been denied the effective assistance of counsel.

tutional search or seizure was introduced at his trial" (slip op. 27; footnote omitted). In our view, the rationale of that holding applies with full force in *Palmore*. If we are correct, Palmore would be entitled to no habeas corpus relief in the United States District Court on his Fourth Amendment claim even if the court of appeals' jurisdictional holding were to be affirmed by this Court.

In these circumstances, we believe that it would be appropriate to vacate the judgment of the court of appeals in *Palmore* and remand the case to that court so that it may consider in the first instance what bearing *Stone* v. *Powell* has on the proper disposition of Palmore's habeas corpus application. The granting of this motion would not affect the status of the *Pressley* case, in which certiorari was concurrently granted and in which the question presented by the petition remains alive and potentially dispositive.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-811

C. L. SWAIN,

Petitioner,

v.

JASPER C. PRESSLEY,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-811

C. L. SWAIN,

Petitioner.

v.

JASPER C. PRESSLEY,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals in *Pressley v. Swain* (Pet. App. D) is reported at 515 F.2d 1290. The *Pressley* opinion incorporates by reference the court's opinion in *Palmore v. Superior Court* (Pet. App. A), which is reported at 515 F.2d 1294.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the District Court erred when it dismissed for want of jurisdiction a habeas corpus petition stating federal constitutional claims filed by a prisoner convicted in the Superior Court for the District of Columbia who had exhausted his remedies in the local court system.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

23 D.C. Code §110(g) provides:

> (g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Article I, Section 9, Clause 2 of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

COUNTERSTATEMENT OF FACTS

On May 23, 1973, Jasper C. Pressley, a prisoner at Lorton Reformatory serving a sentence imposed by the Superior Court of the District of Columbia[1] filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the District of Columbia. The petition alleged that he was in custody under the authority of the United States and that his conviction had been obtained in violation of the Fourth, Fifth, and Sixth[2] Amendments to the United States Constitution and prayed for his release. Jurisdiction was claimed under 28 U.S.C. §2241.

After appointment of counsel and the filing of papers on all sides, the matter came on for a hearing on the

[1] Mr. Pressely had been found guilty of grand larceny (22 D.C. Code §2201) and larceny from the District of Columbia government (22 D.C. Code §2206) and sentenced to 32 to 96 months and 20 to 60 months respectively in the custody of the Attorney General. He appealed and his convictions were affirmed by the District of Columbia Court of Appeals in an unpublished order. (App. 109) In addition to his direct appeal, he filed two further post-conviction motions with the trial court. These were treated as collateral attacks; both were denied on the merits; both denials were appealed and affirmed by the District of Columbia Court of Appeals. (App. 111, 114.)

[2] Although Mr. Pressley raised a broad range of issues in his habeas corpus petition, the gist of his claim was that he had been denied the effective assistance of counsel in violation of the Sixth Amendment. As he put it in his original *pro se* petition: "The Petitioner's argument was and remains, that: THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT IN THAT TRIAL COUNSEL'S GROSS INCOMPETENCE BLOTTED OUT THE ESSENCE OF A SUBSTANTIAL DEFENSE. . . ." (Emphasis in original) App. 63.

question of the District Court's jurisdiction to hear the petition for the writ. On July 18, 1973, the District Court issued an order stating that the petition was dismissed "as this Court does not have jurisdiction over this matter, by virtue of 23 D.C. Code §110(g)." (Pet. App. F) Mr. Pressley's appeal to the United States Court of Appeals for the District of Columbia Circuit was timely.

The Court of Appeals *sua sponte* set Mr. Pressley's case for consideration *en banc* and, after full briefing and argument,[3] reversed the judgment of dismissal by the District Court and remanded for consideration on the merits of Mr. Pressley's claim. Eight of the nine judges sitting joined in Judge Tamm's opinion for the court.[4] The government filed a timely petition for a

[3] After briefing and before argument, the United States Court of Appeals *sua sponte* remanded the case to the District Court for a clarification of its order of dismissal. Specifically, the Court of Appeals inquired whether the District Court had considered Mr. Pressley "as one who had exhausted his remedies in the local court system. . . ." The District Court advised the Court of Appeals that it did not find that Mr. Pressley had exhausted his local remedies. The Court of Appeals reversed the District Court on this point. The petition in this Court did not seek certiorari on the exhaustion of local remedies point, Pet. Br. 15 n. 10, and the issue is not before this Court. Much of the government's "Statement" (of Facts) at Pet. Br. 7-11 is devoted to facts relevant only to the exhaustion of local remedies issue.

[4] The Court of Appeals set Mr. Pressley's case for argument on the same day as *Palmore v. Superior Court*, No. 74-1832, and the opinions in the two cases were both issued on July 9, 1975. The opinion in Mr. Pressley's case refers to, without repeating, the points made in the opinion in *Palmore*. Both cases were brought into this Court by a single writ of certiorari. Counsel for Mr. Pressley is informed by a letter dated July 16, 1976, from counsel for Mr. Palmore to the Clerk of this Court that the writ as to Mr. Palmore's case will be dismissed by consent of the

(continued)

writ of certiorari in this Court, and the writ was granted on February 23, 1976 (A. 116). 424 U.S. 907 (1976).

SUMMARY OF ARGUMENT

In 1970 Congress passed the District of Columbia Court Reform and Criminal Procedure Act.[5] The primary purpose of the Act was to reorganize the courts in the District of Columbia so that criminal cases could be disposed of more expeditiously. Prior to the Court Reorganization Act, most serious local crimes had been prosecuted in the United States District Court. The extensive delays that were prevalent in criminal prosecutions in the District Court were thought to be contributing to the high crime rate in the District.

In order to reduce delays in criminal prosecutions, Congress provided for two parallel court systems in the District of Columbia. The first was the traditional system of federal courts created pursuant to Article III of the Constitution, which were henceforth to have the same jurisdiction as all the other federal courts in the rest of the country.

The prosecution of local crimes (as well as local civil cases) was transferred from the federal courts to a

(footnote continued from preceding page)

parties. The government's brief contains what purports to be a summary of the Court of Appeals' opinions in *Pressley* and *Palmore*. Pet. Br. 11-15. Mr. Pressley disagrees with the government's characterization of the Court of Appeals opinions, which speak for themselves.

[5] Act of July 29, 1970, Public Law 91-358, 84 Stat. 473, hereinafter referred to as the "Court Reorganization Act."

newly created local court system. The new local courts, which were created pursuant to Article I powers granted Congress by the District of Columbia Clause of the Constitution,[6] were vastly expanded in size beyond the old local courts of limited jurisdiction in order to accommodate the large volume of new business to be committed to the jurisdiction of the new courts. Efforts were made to upgrade the administration of the new courts and the quality of their judicial personnel.

In creating these new non-Article III courts, Congress stated its intention to emulate the relationship between the state and federal courts as they co-exist in the various states. In this way, the District would have local courts devoted entirely to local judicial business while the federal courts would be free to pursue the traditional federal jurisdiction.

One part of the elaborate statutory scheme necessary to create an entirely new local court system was a section – 23 D.C. Code §110 – that granted to the new local courts the power to review their own convictions by way of collateral attack by motion. The language creating this remedy by motion in the new local courts was borrowed from the general federal statute that provides for collateral attack by motion in the federal courts, 28 U.S.C. §2255.

The government argued below that the statute creating the post-conviction remedy by motion in the new local courts made that remedy the exclusive remedy for prisoners of the local courts and cut off their traditional right to habeas corpus review in the Article III courts. In short, the government asserted that 23 D.C. Code §110 extinguished the jurisdiction

[6] *U.S. Const.* art. I, §8, cl. 17.

of the inferior Article III courts to hear the habeas corpus petition of a prisoner convicted in the local District of Columbia courts even if that prisoner had been convicted in violation of his federal constitutional rights and had exhausted every remedy in the local court, without obtaining relief.

Eight judges of the Court of Appeals, sitting *en banc*, rejected the government's argument and found instead that 23 D.C. Code §110 contained an exhaustion provision that required nothing more than exhaustion of local remedies before a petitioner could be heard in the federal courts on habeas corpus.

The words of one subsection of the District of Columbia collateral attack by motion statute, 23 D.C. Code §110(g), read in a vacuum, would appear to reach the government's proposed result of cutting off habeas corpus in the Article III courts for District of Columbia prisoners. Mr. Pressley argues, however, that Subsection 110(g) should not be read to achieve such a drastic and novel result without first ascertaining whether it was in fact the intention of Congress to eliminate the federal habeas corpus jurisdiction of the Article III courts over prisoners of the local courts.

The government concedes that the intention of Congress is relevant to the interpretation that ought to be given the statute. Petitioners' Brief at pages 28-29 (hereinafter referred to as "Pet. Br."). Reference to the legislative history of 23 D.C. Code §110,[7] as a means of comprehending the intention of Congress, shows that Congress had a different, and much less ambitious, purpose than that contended for by the government.

[7] Subsection 110(g) has no separate legislative history beyond that pertaining to the whole of Section 110.

Section 110 was simply meant to codify the power of the new courts to review their own convictions and to specify the procedures by which that might be done.

Before Court Reorganization, the old District of Columbia local courts had held that the general federal post-conviction remedy by motion statute, 28 U.S.C. §2255, did not apply in the local courts. But the old local courts did find they had a general common law power to review their own convictions. The new statute, 23 D.C. Code §110, was simply an effort to codify this result and to provide a simple and expeditious method of collateral attack in the new courts.

Given an affirmative congressional intention to codify for the new courts the already existing District of Columbia collateral attack, there are a number of other circumstances that make it even more doubtful that Congress intended to restrict the traditional habeas corpus jurisdiction of the Article III courts. When 23 D.C. Code §110 was pending before Congress, it was seen as no more than a restatement of existing law, which had always included access to the Article III courts in the District of Columbia for ultimate resolution of federal constitutional questions arising in the course of criminal prosecutions in the old local court system. There is no hint in the legislative history that Congress intended to alter the *status quo* or to reach the result that the government urges on this Court. To the contrary, there is every indication that Congress saw 23 D.C. Code §110 as containing nothing more than "technical changes" designed to conform the words of 28 U.S.C. §2255 to the contours of the new District of Columbia court system.

If Congress intended to close the doors of the Article III courts to prisoners of the new local court system, then it chose a very odd way of doing so. The government would have this Court believe that Congress secreted an implied repeal of the habeas jurisdiction of the Article III courts all across the country in a remote corner of the District of Columbia code. The government's argument becomes even more improbable when one considers the care with which Congress amended a host of other general statutory provisions in Title 28 of the United States Code governing the federal courts. The general habeas corpus statute was not amended.

Also, there is no evidence in the legislative history that the Congress intended to treat collateral attack in the District of Columbia any differently than it is treated in the state courts to which the new District of Columbia system was meant to be analogous. Of course, in the states, federal review of constitutional questions is available to those who have exhausted their state remedies.

The Court of Appeals' opinion, which interprets 23 D.C. Code §110(g) as a requirement that District of Columbia prisoners exhaust their local remedies, is consistent with a tradition in this Court of reading statutes that appear to restrict access to Article III habeas corpus so as to avoid difficult questions that would otherwise be raised by the Suspension Clause of the Constitution.[8] In the past in other cases, the government has argued to this Court that Congress had committed constitutional adjudication of prisoners' claims exclusively to the state courts, to the courts

[8] *U.S. Const.* art. I, §9, cl. 2.

martial, to the immigration authorities, or to other non-Article III forums. In every such case, this Court has read those statutes as merely describing the final procedural point in the non-Article III process. That final point thereby defines what non-Article III remedies must be exhausted before access to the Article III courts becomes available.

This Court has explained its tradition of interpreting finality statutes as a method of avoiding difficult constitutional questions that would be raised if the finality statutes in fact operated to the exclusion of the Article III courts. Any interpretation of the finality statutes that closes the Article III courts to habeas petitioners would force this Court to define the as-yet undefined "privilege of the writ of habeas corpus" protected by the Suspension Clause of the Constitution. Although this Court has not yet specified exactly what is protected by the Suspension Clause, persons confined by authority of the United States have enjoyed the right to seek ultimate adjudication of their federal constitutional claims in the Article III courts without interruption since the inception of our Republic.

Mr. Pressley recognizes that this Court has accepted a substitute for habeas corpus rights of prisoners held by the United States. This Court found the federal post-conviction remedy by motion in 28 U.S.C. §2255 to be a constitutionally acceptable substitute for traditional habeas corpus. But this Court has since held that only a remedy like Section 2255, which is "exactly commensurate" with traditional federal habeas corpus, can avoid raising the thorny constitutional issues implicated in the Suspension Clause of the Constitution.

The government has suggested that the remedy in the new local courts is a constitutionally acceptable

substitute for the remedy formerly afforded by the Article III courts. But the new local courts are Article I courts whose judges serve for a fixed term of years, are subject to removal, and are not guaranteed their salaries. Courts manned by such judges are different from Article III courts, whose judges enjoy an independence that comes only from the type of salary and tenure protections that are written into Article III of the Constitution. Therefore, a substituted remedy in a non-Article III court cannot pass the "exactly commensurate" test and thereby avoid constitutional difficulty.

Mr. Pressley asserts that this case is one in which a fairly avoidable constitutional question should be avoided. Congress did not intend 23 D.C. Code §110(g) to reach the result that would provoke the constitutional issue in this case. The Court of Appeals' interpretation, which avoids the constitutional question, is in accord with the general scheme of the Court Reorganization Act and with accepted norms of statutory interpretation. The Court of Appeals' interpretation of Section 110 as requiring exhaustion of local remedies maintains the *status quo* in the District of Columbia and leaves Congress free to enlarge upon or clarify the statute, if there is any need for clarification or enlargement.

The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I.

THE GOVERNMENT'S INTERPRETATION OF 23 D.C. CODE §110 LEADS TO A RESULT THAT CONGRESS DID NOT INTEND.

The government argues to this Court that in enacting 23 D.C. Code §110, which codifies a post-conviction remedy by motion in the new local courts, Congress meant to make that remedy exclusive and to cut off the traditional access of District of Columbia prisoners to the Article III courts for ultimate resolution of their federal constitutional claims.

Mr. Pressley, on the other hand, maintains that Congress had a different, and a much more modest, intention in passing Section 110. The intention of Congress was to do no more than to codify the local post-conviction remedy, the existence and source of which had previously been in doubt. Therefore, to give 23 D.C. Code §110 the reading prayed for by the government would be to reach a result that Congress never intended.

Examination of the legislative history of Section 110 shows that at the time Congress passed the Court Reorganization Act, the only post-conviction attack available in the local District of Columbia courts was by way of a common law motion. The expressed intention of Congress in enacting 23 D.C. Code §110 was to codify this common law remedy. In order to achieve this codification, Congress borrowed language from the general post-conviction motion statute applicable in the Article III courts, 28 U.S.C. §2255. The government is

unable to show any evidence that Congress intended a different consequence of borrowing that language: that the Article III courts in the District of Columbia would henceforth be closed to the habeas corpus petitions of prisoners of non-Article III courts.

Congress did evidence an intention to regulate the relations of the federal courts and the local courts in the District of Columbia in the same way that the relations of the state and the federal courts in the various states are regulated. That relationship includes federal habeas corpus for state prisoners. There is no indication that Congress intended to treat habeas corpus in the District differently from the way it is treated in the states. The lack of evidence of congressional intention to exempt post-conviction remedies from the state/federal analogy is highlighted by the fact that although Congress took pains to amend Title 28 of the United States Code so as to accommodate the new local District of Columbia courts, it did not amend the part of Title 28 that gives the Article III District Court jurisdiction over Mr. Pressley's case, 28 U.S.C. §2241.

Instead of reaching a drastic result that Congress did not intend, the Court of Appeals read 23 D.C. Code §110 as requiring no more than exhaustion of remedies in the new local courts before resort to the Article III courts on habeas corpus. In doing so, the Court of Appeals followed a distinct line of cases in this Court. In each of these cases, a statute appeared to commit all post-conviction attack exclusively to a non-Article III forum and thereby cut off access to the Article III courts on habeas corpus. In each case, this Court interpreted those statutes as requiring no more than exhaustion of the non-Article III remedies as a

prerequisite to ultimate constitutional adjudication in the Article III courts.

This Court should affirm the Court of Appeals' interpretation of Subsection 110(g) as requiring exhaustion of all appropriate remedies in the new local courts. This interpretation, joined in by eight of the nine judges of the Court of Appeals, avoids interference with federal habeas corpus – a result that Congress did not intend.

A. The Legislative History of 23 D.C. Code §110 Makes Clear That the Intention of Congress in Enacting Section 110 Was Simply to Resolve Doubts About the Existence and Nature of Post-Conviction Relief in the New Local Courts.

The government concedes that reference to the intention of Congress is relevant in interpreting this statute. Pet. Br. 28-29. Reference to the intention of Congress is appropriate because:

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." *United States v. American Trucking Associations*, 310 U.S. 534, 543-44 (1940) (citations omitted) (quoted at Pet. Br. 29).[9]

[9] *See also Train v. Colorado Public Interest Research Group*, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434, 441 (1976); and Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 Colum. L. Rev. 1299 (1975).

In the case of 23 D.C. Code §110, evidence of the intention of Congress, which must necessarily affect how this statute is to be construed, is not consistent with the statutory interpretation urged by the government. From the legislative history of Section 110, there emerges an affirmative congressional intention to codify the existing District of Columbia law on post-conviction remedies. The expressed purpose of this codification was limited; it was intended to eliminate doubts as to whether or not such a remedy existed in the local District of Columbia courts and to establish the appropriate procedures to effectuate the remedy in those courts. There is not the slightest indication of a broader purpose to cut off the right of federal habeas corpus of local District of Columbia court prisoners.

In order to understand the legislative history of 23 D.C. Code §110, it is first necessary to understand the background of the problem to which Congress addressed itself in enacting that section. In 1948, Congress had passed the statute that is now codified as 28 U.S.C. §2255.[10] While the purposes of Section 2255 are more fully examined elsewhere in this brief,[11] it is sufficient at this point to say that 28 U.S.C. §2255 created a comprehensive new scheme for a simplified post-conviction remedy by motion in the federal courts. A new motion to set aside a conviction was provided in the context of the existing criminal case. This motion replaced the traditional independent civil action of habeas corpus. This reform solved certain housekeeping problems among the inferior federal courts and provided a less complicated format for litigating the same issues that had previously been litigated on habeas corpus.

[10] Act of June 25, 1948, c. 646, 62 Stat. 967.

[11] See Part I(B), *infra*.

The 1948 version of 28 U.S.C. §2255 applied to prisoners "under a sentence of a Court of the United States." It was quickly realized that the term "Court of the United States" was a term of art that referred to the courts created pursuant to Article III of the Constitution. The territorial courts, which are created pursuant to Article I, §8, cl. 17 of the Constitution, were therefore excluded. H.R. Rep. No. 352, 81st Cong., 1st Sess. (1949); 2 U.S. Code Cong. Serv. (1949), p. 1272. Accordingly, in 1949, one year after passage of the original 28 U.S.C. §2255, that section was amended to change the words "Court of the United States" to the broader term "court established by Act of Congress" so as to include the territorial courts. Act of May 24, 1949, c. 139, §114, 63 Stat. 105.

Inevitably, the question subsequently arose whether the broader term, "court established by Act of Congress," included the non-Article III courts that then existed in the District of Columbia. In the case of *Burke v. United States*, 103 A.2d 347 (D.C. Mun. App. 1954), the old District of Columbia Municipal Court of Appeals, an Article I court, was confronted by a post-conviction motion to set aside a conviction that had ostensibly been filed pursuant to the amended 28 U.S.C. §2255. The *Burke* court examined the 1949 amendment. First, the court noted that there was a clear-cut congressional intention to bring the territorial courts within 28 U.S.C. §2255. Second, the court could discern no statement of congressional intention to include the non-Article III District of Columbia courts within the Act. The court therefore held that even though the non-Article III District of Columbia courts were "courts established by Act of Congress," they

were not included in the amended 28 U.S.C. §2255 because Congress had not intended them to be.[12]

However, the *Burke* court went on to find that although 28 U.S.C. §2255 did not apply, nevertheless, the non-Article III local courts did have inherent power to review the legality of their own judgments.[13] While this decision preserved the right of prisoners to seek review of their confinements in the court in which the conviction had been entered,[14] the holding left the source and nature of this common-law remedy undefined. And, of course, the procedures to be followed on this newly discovered common law motion were nowhere codified.

Thus stood the law in the District of Columbia in 1970 when Congress proposed to completely reorganize the courts in the District of Columbia. The genesis of Congress' decision to reorganize the District of Columbia courts is simple to trace out. The crime rate in the District was alarmingly high. There was a large backlog of untried criminal prosecutions in the United States District Court for the District of Columbia, which then had jurisdiction over the majority of local, as well as federal, criminal cases. The fact of long delays between arrest and trial was thought to be

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[12]The *Burke* decision was followed without extensive discussion in *Ingols v. District of Columbia*, 103 A.2d 879 (D.C. Mun. App. 1954).

[13]This review could not have been by habeas corpus in the non-Article III local courts since their habeas jurisdiction was specifically limited to non-governmental confinements arising in the context of domestic relations. 16 D.C. Code §§911, 901 (1967 ed.).

[14]In addition, of course, to their traditional habeas corpus remedy in the federal Article III courts.

contributing to the high crime rate. *See generally* "Remarks of Senator Tydings," *Hearings Before the Committee on the District of Columbia*, United States Senate, 91st Cong., 1st Sess., Part III, pp. 467-69 (5/19/69).[15]

[15]The government also points out that the high crime rate was of concern to Congress at the time it enacted the Court Reorganization Act and that the new local courts were designed to be better able to cope with the rapid increase in criminal prosecutions. Pet. Br. 36-37. With that much, Mr. Pressley agrees. However, the government goes on to suggest that post-conviction attack was part of the business that Congress intended to transfer to the new local courts. On this point, the government is confined to speculation since there is no evidence in the legislative history that Congress ever thought of the problem of collateral attack as contributing to the problem of backlog in the District Court. Nor is there evidence that Congress thought that transferring collateral attack to the new local courts would help to solve the caseload problem of the District Court. To fill this void, the government takes a few words of the legislative history out of context and claims that these few words imply the government's suggested result. The quoted words are: "Believing that 'swift and sure justice' would help relieve 'the soaring crime rate' and that 'reorganization of the court system . . . is a step toward swifter and surer justice in the District,' Congress determined to provide for a 'total transfer of local jurisdiction' . . ." to the new local courts. Pet. Br. 36-37. That characterization of the legislative history is inaccurate on two counts. First, the words "total transfer" appear as part of the phrase "total transfer of all purely local business to the local court system." H.R. Rep. No. 91-907, 91st Cong., 2d. Sess. 33 (1970). Whether federal habeas corpus is "purely local business" is one of the issues in this case, and the government does not, because it cannot, offer this Court any evidence that Congress considered the habeas corpus business of the District Court as to prisoners of the local courts to be a "purely local" matter. Instead, examination of the legislative history shows that the words "total transfer" were not used substantively, but descriptively, to separate

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Congress began holding hearings on the subject of the District's crime problem, and by 1969, a number of bills were pending in Congress each of which dealt with one or more facets of the courts' apparent inability to deal with the problem.[16] When President Nixon declared the reduction of crime in the District to be a goal of his administration, the Department of Justice undertook to draft comprehensive legislation. Essentially, the Department's bill reorganized the District of Columbia Courts so that local crimes would be tried in a greatly expanded and upgraded local court

(footnote continued from preceding page)

the proposal finally adopted by Congress from the numerous "partial transfer" proposals put forward by groups that testified before the various committees of Congress, *e.g.*, the Gesell/Ellison Commission's proposal for transfer to the new local courts only of crimes punishable by less than 15 years, and civil cases involving less than $25,000. "Recommendations for the Reorganization of Our Courts, Submitted by the Committee on the Administration of Justice," *Hearings Before the Committee on the District of Columbia*, United States Senate, 91st Cong., 1st. Sess. Part III, pp. 581, 586 (5/19/69). What the House committee report actually said is subtly, but crucially, different from the impression given by the government's selected quotations, which although stitched into one piece in the government's brief, are actually scattered over eight pages of text. The House committee report says that "court reorganization" is related to the goal of "swifter and surer justice." "Court reorganization" is then defined as "total transfer of local jurisdiction" as is the case in the fifty states. Of course, in the fifty states, the Article III courts are available to hear the habeas corpus petitions of state prisoners. The federal habeas corpus jurisdiction is not local business. The government cannot point to a place in the legislative history where Congress linked its purpose to reduce the backlog of criminal cases to the removal of collateral attack to the new local courts.

[16]None of these bills mentioned post-conviction relief.

system thereby leaving the federal Article III courts free to concentrate on the matters that come within the jurisdiction of all federal courts.[17]

What is now 23 D.C. Code §110 made its first legislative appearance in the Department of Justice bill. That bill was introduced at the long-running hearings on the subject of crime in the District Committee of the United States Senate on July 15, 1969.[18] On that date, the bill was presented to the Senate by then Deputy Attorney General Richard J. Kleindienst, who orally summarized the contents of the bill.

First, Mr. Kleindienst summarized the general outlines of the proposed reorganization of the courts. Then he came to Title IV of the bill entitled "Criminal Law and Procedures," which contained a wide variety of provisions among which was the section which is now 23 D.C. Code §110.[19] The relevant parts of Mr. Kleindienst's statement are these:

[17]The Court Reorganization Act begins its definition of the civil jurisdiction of the United States District Court for the District of Columbia as follows: "In addition to its jurisdiction as a United States district court. . . ." 11 D.C. Code §501. Habeas corpus invokes the civil jurisdiction of the court. *Cross v. Burke*, 146 U.S. 82, 88 (1892); *Farnsworth v. Montana*, 129 U.S. 104, 113 (1889); *Fisher v. Baker*, 203 U.S. 174, 181 (1906).

[18]The bill was introduced as S. 2601 and after extensive hearings was subsequently reported out by the committee and passed by the Senate. Virtually the same bill was introduced in the House as H.R. 16196 where it was passed as amended on the House floor, there having been no committee hearings on the bill in the House. Section 110 was ultimately passed exactly as proposed by the Department of Justice and was not specifically debated on the floor of the Senate or the House. After passage by both houses, the bill was signed into law. 84 Stat. 473.

[19]The bill was subsequently reorganized so that, when passed, Title IV had become Title II (still entitled "Criminal Law and Procedure") and Section 402 had become part of Section 210 ("Codification of Title 23 of District of Columbia Code"), which contains the new 23 D.C. Code §110. However, the wording of the section did not change.

> Title IV of the Reorganization Act contains the sections dealing with criminal law and procedure. Most of the sections are merely restatements of existing law and wherever appropriate the language of Federal statutes or Federal rules has been used.
>
> These are the changes: . . .
>
> 5. Procedures for post conviction remedies (§402 enacting District of Columbia Code 110). Although the local court may have inherent power in the matter of post conviction remedies, a special procedure was created to eliminate unnecessary litigation and add certainty to the law.

"Statement of Richard J. Kleindienst," *Hearing Before the Committee on the District of Columbia*, United States Senate, 91st Cong., 1st Sess., Part III, p. 1154 (7/15/69).

Mr. Kleindienst's remarks are a direct statement of what the Department of Justice thought 23 D.C. Code §110 would accomplish. He referred, though not by name, to the assumption in the *Burke*[20] case that the old local Article I courts had an inherent power to hear post-conviction attacks. He then made it clear that the purpose of the new Section 110 was merely to give certainty to the law by codifying what had theretofore been a common law power. All of this, he characterized as "merely restatements of existing law." Of course, "existing law" included not only the common law post-conviction attack in the local non-Article III courts, but also the traditional access to the federal Article III courts under 28 U.S.C. §2241 for adjudication of federal constitutional questions. *E.g.*,

[20]*Burke v. United States, supra*, 103 A.2d 347 (D.C. Mun. App. 1954); *see Ingols v. District of Columbia, supra*, 103 A.2d 879 (D.C. Mun. App. 1954).

O'Beirne v. Overholser, 109 U.S. App. D.C. 279, 287 F.2d 133 (1960).

Mr. Kleindienst referred to the fact that "wherever appropriate the language of Federal statutes or Federal rules has been used." Evidently, in borrowing the words of Section 2255 wholesale as a model for a local post-conviction remedy, the drafters of the bill borrowed language in the last paragraph that appears to reach a result that they did not intend. The government now seeks to go back and to find in that borrowed language a meaning that the language was not seen to have at the time Mr. Kleindienst testified in the Senate District Committee.

The nature of 23 D.C. Code §110 as a codification of the *Burke* case was made even clearer in a written summary of the Department's proposed bill that was handed to the Senate District Committee together with the bill. That summary characterized 23 D.C. Code §110 as follows:

> *Section 23-110* is new. Rather than relying on the inherent power of the superior court to review judgments of conviction, the new section provides statutory procedures for post-conviction challenges. Section 23-110 is modeled upon 28 U.S.C. section 2255 with only the necessary technical changes.

"Summary of Proposed Court Reorganization Act of 1969," *Hearings Before the Committee on the District of Columbia*, United States Senate, 91st Cong., 1st Sess., Part III, p. 1145 (7/15/69). Once again the Department of Justice told Congress that its proposed Section 110 simply codified a post-conviction remedy by motion in the new local courts. The Department characterized any changes from the language of the model, 28 U.S.C. §2255, as "only the necessary technical changes."

The Department's stated view of Section 110 subsequently became Congress' stated view. The language of the Department's written summary of Section 110 was carried verbatim into the Senate District Committee's report to the full Senate. S. Rep. No. 91-405, 91st Cong., 1st Sess. 38 (1969). Again the same exact description of Section 110 was picked up without change when the bill was reported to the full House of Representatives. H.R. Rep. No. 91-907, 91st Cong., 2d. Sess. 117 (1970). Since Section 110 was adopted by both houses without further debate or amendment, it appears that Congress' intention is expressed by the Department's description of its own bill.

What is missing from the legislative history is as significant as what is there. Missing is any statement that the Department of Justice thought that its bill would cut off the traditional right of prisoners who have exhausted their local remedies to seek federal constitutional review of their convictions in the Article III courts. Missing is any evidence that the Department of Justice ever told Congress that the Department's bill would have the unprecedented effect of closing the doors of the inferior Article III courts to persons convicted in the new local courts. Missing is any indication that Congress, on its own, thought that it was restricting the habeas jurisdiction of the United States District Court.[21]

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[21]The court below in this case found it particularly significant that there was no debate in Congress as to the constitutionality of 23 D.C. Code §110. 515 F.2d at 1310-11. If, as the government argues, this bill was meant to terminate the Article III habeas corpus rights of those convicted in the Superior Court, one would expect some debate as to its compatability with the constitutional prohibition against suspension of the writ. This expectation is particularly strong in view of the fact that in

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When Section 110 was pending, the Department of Justice told Congress that the section merely restated the existing law with only necessary technical changes. Congress acquiesed in that interpretation. The government now argues that in Subsection 110(g), one of those changes, far from being merely technical, has for the first time in two hundred years of constitutional history created a category of Federal prisoners who are denied review as of right in the Article III courts of their federal constitutional questions. That drastic result was not intended by Congress. Instead, the legislative history demonstrates that Congress had a different, and less radical, intention when it passed Section 110. The government's belated interpretation far exceeds Congress' intention and should be rejected by this Court.

(footnote continued from preceding page)

1968, a year before the Court Reorganization Act, and in 1973, after the Court Reorganization Act, Congress had extended and heated debates on the constitutionality of two bills that would have restricted access to federal habeas corpus. *See* 114 Cong. Rec. 11186 *et seq.* (1968); 119 Cong. Rec. 2220 *et seq.* (1973). Indeed, as one reads through the extensive hearings held on the Court Reorganization Act by Senator Tydings in his capacity as Chairman of the Senate District Committee, it strains credulity to think that he and his committee listened to days of debate about the constitutionality of the "no-knock" and "preventive detention" provisions of the Court Reorganization Bill and never raised any question about a section that would have cut off habeas corpus. Only one year earlier he had opposed on constitutional grounds a bill that would have cut off habeas corpus for state prisoners. *See* 114 Cong. Rec. 13850-67, 13990-97, 14136-37 (1968). The more reasonable explanation is that neither Senator Tydings, nor the Department of Justice, nor the Congress intended any such result.

B. Consideration of 23 D.C. Code §110 in Relation to the Legislative Pattern of the Court Reorganization Act as a Whole Indicates That Congress Did Not Intend the Drastic Result For Which the Government Argues.

In addition to the legislative history directly applicable to 23 D.C. Code §110, indications of Congress' intention may also be discerned from the pattern of the Act of which that section is a part. From the design of the Act as a whole, there emerges a clear congressional intention to emulate the relationship between the state and federal courts in regulating the relations of the two parallel court systems in the District of Columbia. *Palmore v. United States*, 411 U.S. 389, 407, 410 (1973); *Pernell v. Southall Realty*, 416 U.S. 363, 362 (1974).[22]

The Court of Appeals reasoned that if 23 D.C. Code §110 were interpreted so as to operate as a total bar to ultimate constitutional adjudication in the inferior Article III courts, then that statute would depart from the state/federal model. In the states, ultimate review of federal constitutional questions arising in the course of

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[22]The legislative history of the Court Reorganization Act is also replete with references to Congress' intention to pursue the state/federal analogy. S. Rep. 91-405, 91st Cong., 1st Sess. 1, 5, 10 (1969); H.R. Rep. No. 91-907, 91st Cong., 2d. Sess. 23, 32-35 (1970); *Statement of Managers*, 91st Cong., 2d Sess. 5 (1970); Remarks of Congressman Harsha, 116 Cong. Rec. 8098; Remarks of Congress Nelsen, 116 Cong. Rec. 8088; Remarks of Senator Baker, 116 Cong. Rec. 24740; Remarks of Senator Ervin, 116 Cong. Rec. 8918; Remarks of Congressman Hogan, 115 Cong. Rec. 7934.

state criminal prosecution is available in the federal district courts by way of habeas corpus. In the absence of evidence of a congressional intention to exempt this facet of the Act from the general state/federal analogy, the Court of Appeals read 23 D.C. Code §110 so as to harmonize it with the totality of the Act of which it is a part. If 23 D.C. Code §110 is a part of the general pattern of the Act, rather than an exception to it, then Section 110 would require no more than exhaustion of local court remedies before a person could present his federal constitutional questions to the Article III courts. This was the interpretation adopted by the Court of Appeals.

Not only did Congress not evidence any intention to take post-conviction relief out of the general state/federal pattern of the Act, it also did not amend the general habeas corpus statutes that on their face grant to the Article III District Courts the jurisdiction to hear cases such as Mr. Pressley's. The habeas corpus jurisdiction of the Article III courts is codified in Chapter 153 of Title 28 of the United States Code.[23] The general jurisdictional statute in that Chapter – 28 U.S.C. §2241 – by its terms applies to Mr. Pressley and to all others convicted in the Superior Court who allege violations of their constitutional rights.[24]

[23]Chapter 153, which is entitled "Habeas Corpus," contains a general jurisdictional statute, 28 U.S.C. §2241, procedural and evidentiary statutes, 28 U.S.C. §§2242-2253, a provision dealing with relations between the state and federal courts, 28 U.S.C. §2254, and a statutory remedy by motion, which is a substitute for habeas corpus for federal prisoners, 28 U.S.C. §2255.

[24]Mr. Pressley's case is described by 28 U.S.C. §2241(c)(1) since he is in custody by authority of the United States having (1) been prosecuted by the United States Attorney (2) for a violation of a statute passed by Congress and signed by the President (3) in a court created by Congress and (4) sentenced by a judge appointed by the President and confirmed by the Senate (5) to the custody of the Attorney General of the United States.

If, as the government argues, Congress intended to exclude persons convicted in the Superior Court from the operation of the general federal habeas statutes, then one would expect to find an amendment somewhere in Chapter 153 of Title 28 to express the exemption.[25] However, there is no amendment to Chapter 153 in the Court Reorganization Act.

The absence of any amendment to Chapter 153 is particularly significant when one considers the care with which Congress amended the balance of Title 28 of the United States Code in order to dovetail the new local courts with the Article III courts. The careful process of amendment demonstrates that Congress well knew how to fit aspects of the new court system into the state/federal analogy when it wished to. When Congress wanted to make exceptions to the state/federal analogy, the amendments creating those exceptions are clear and specific.

The congressional amendments to Title 28 fall into two groups. Where Congress was shaping the broad outlines of the new federal courts, Title 28 was amended to make the new courts fit into the federal laws in the same way the states do. So for example Congress:

[25]Of course, the simplest method would have been an amendment to 28 U.S.C. §2255 to make it apply to the new local courts. An amendment, such as "any court created by an Act of Congress, including the local District of Columbia courts," would have made Section 2255 apply specifically to the new courts and thereby filled the gap left by the 1949 amendment to Section 2255, which had been held to reach only the territorial courts. *See* Part I(A), *supra*, and *Burke v. United States, supra*, 103 A.2d 347 (D.C. Mun. App. 1954). However, an amendment to the general jurisdictional statute, 28 U.S.C. §2241, would also have been logical. In either case, an express provision "would have been easy." *Farnsworth v. Montana*, 129 U.S. 104, 113 (1889).

1) Amended Chapter 81 of Title 28 (Supreme Court) by including within the term "highest court of a State" the District of Columbia Court of Appeals thereby providing for review of local court decisions in the Supreme Court by appeal or by certiorari [*see* 28 U.S.C. §1257];

2) Amended Chapter 85 of Title 28 (District Courts; Jurisdiction) by adding a section that for the purposes of that chapter excludes from the term "laws of the United States or Acts of Congress" all laws applicable only to the District of Columbia [*see* 28 U.S.C. §1363];[26]

3) Amended Chapter 89 of Title 28 (District Courts; Removal of Cases from State Courts) by adding a section defining for the purposes of that chapter the term "State court" to include the Superior Court and the term "State" to include the District of Columbia [*see* 28 U.S.C. §1451); and

4) Amended Chapter 133 of Title 28 (Review; Miscellaneous Provisions) by defining the terms "State court(s)" and "highest court of a State" to include the District of Columbia Court of Appeals for the purposes of certain sections of that chapter dealing with procedural rules governing Supreme Court review [*see* 28 U.S.C. §2113].

On the other hand, when Congress did make exceptions to the general state/federal analogy, the exceptions concerned housekeeping matters that were

[26]This amendment was principally necessary to exclude from the federal question jurisdiction of the District Courts questions arising under the District of Columbia Code and other statutes applicable only in the District of Columbia. *See* 28 U.S.C. §1331, which is also in Chapter 85 of Title 28. 28 U.S.C. §1331 is thereby harmonized with 11 D.C. Code §§923(b)(1), 921.

different in the District of Columbia by virtue of the fact that one sovereignty had created both of the parallel court systems there.[27] So for example Congress:

1) Amended Chapter 13 of Title 28 (Assignment of Judges to Other Courts) by providing for the designation and temporary assignment of District Court judges to sit in the new Superior Court [*see* 28 U.S.C. §292(c)];[28] and

2) Amended Chapter 121 of Title 28 (Juries; Trial by Jury) by defining the term "district court" to include the Superior Court for the purposes of certain sections of the Federal Jury Act [*see* 28 U.S.C. §1869(f)].[29]

[27]The government argues that the analogy to the state/federal relationship "was not meant to be perfect." Pet. Br. 42, citing the fact that local judges are appointed by the President and confirmed by the Senate. Mr. Pressley agrees. However, his point was not that Congress created a fifty-first state but that Congress meant the relationship of the local and the federal courts to be *like* the relationship of the state and federal courts. Mr. Pressley contends that it is a fair reading of the Court Reorganization Act to say that Congress did hew to the state/federal analogy in shaping the fundamental relationship of the local and federal courts. Federal habeas corpus is an important part of that relationship in the states.

[28]This amendment harmonized the federal statute with 11 D.C. Code §908(c).

[29]This amendment harmonized the federal statute with 11 D.C. Code §§1901 *et seq.* There are other exceptions to the state/federal analogy that, since they do not affect the operation of the United States Code, are reflected only in the District of Columbia Code. For example, one prosecutor, the United States Attorney, prosecutes in both the local and the federal courts. 23 D.C. Code §101(c). The fact of a single prosecutor operating in both court systems was accompanied by a provision allowing grand juries in the District of Columbia to return indictments in either court system. 11 D.C. Code §1903.

The existence of habeas corpus review of federal constitutional questions in the Article III courts shapes one of the major aspects of the relationships between the state and federal, and of the District of Columbia and the federal courts. Neither in the legislative history, nor in the way it amended existing statutes, did Congress express any intention to alter that relationship in the District of Columbia.

This Court, in another context, has previously noted the significance of a failure in the Court Reorganization Act to amend a provision of Title 28. When Congress amended 28 U.S.C. §1257, providing for appeals to the Supreme Court by appeal and by certiorari, as noted above, it included the new District of Columbia Court of Appeals within the term "highest court of a state." But it did not include the District of Columbia Code within the term "statute of any state" in 28 U.S.C. §1257. In *Palmore v. United States*, 411 U.S. 389 (1973), this Court took note of that failure of Congress to amend the words dealing with statutes. Pointing to the care with which the Court Reorganization Act amended Title 28 where appropriate, the *Palmore* Court held that Congress had not intended decisions of the District of Columbia Court of Appeals upholding the constitutional validity of District of Columbia Code provisions to proceed into this Court by way of appeal. 411 U.S. at 394-5.[30]

[30]*See also District of Columbia v. Carter*, 409 U.S. 418 (1973), where in another context Congress' failure to specifically include the District of Columbia within the term "any State or Territory" as used in 42 U.S.C. §1983 was taken as evidence of a lack of congressional intent to make that statute apply in the District of Columbia.

The placement of the language at issue here solely in the District of Columbia Code contradicts the government's thesis. The government argues that 23 D.C. Code §110(g)[31] was meant to close the doors of the Article III courts all across the country to the habeas corpus petitions of Superior Court prisoners no matter where those prisoners happen to be confined. Pet. Br. 47-48.[32]

[31]In this regard, the government relies on the following words in Subsection 110(g): "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained . . . by any Federal . . . court. . . ."

[32]This government argument—that under the Court of Appeals' interpretation of Section 110 Superior Court prisoners who are incarcerated outside the District of Columbia will be able to attack their convictions in District Courts all over the country—is a scare argument. The Court of Appeals' opinion in Mr. Pressley's case demonstrates that the Article III courts in the District of Columbia recognize their responsibility to hear the habeas claims of Superior Court prisoners who, like Mr. Pressley, are confined outside the District of Columbia. As for the Article III courts outside the District of Columbia, they are equipped with adequate procedural machinery to insure that habeas claims are litigated in the most appropriate forum. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *e.g., Eisel v. Secretary of the Army*, 155 U.S. App. D.C. 366, 477 F.2d 1251 (1973); *Reese v. Board of Parole*, 162 U.S. App. D.C. 156, 498 F.2d 698 (1974); *Starnes v. McGuire*, 168 U.S. App. D.C. 4, 512 F.2d 918 (1974) (*en banc*). *See also Wright v. Jackson*, 505 F.2d 1229 (4th Cir. 1974) (Prison conditions habeas corpus filed from Lorton Reformatory in the Eastern District of Virginia transferred to the District of Columbia on *forum non conveniens* grounds). Counsel for Mr. Pressley has been informed by the Clerk of the United States District Court for the Eastern District of Virginia that habeas corpus petitions filed in that court by Superior Court prisoners confined in the Reformatory at Lorton, Virginia, attacking the legality of their sentences are routinely referred to the United States District Court for the District of Columbia.

And yet, if the intention of Congress were to bar entry to all of the nation's Article III courts, placement of this would-be jurisdictional bar in a section granting power to the new local courts contained in a remote corner of the District of Columbia Code seems odd. It would have been more reasonable to expect placement of this jurisdictional prohibition, if that was what it were, in the United States Code where it would be in proximity to the general jurisdictional grant and more likely to come to the attention of the District Courts outside the District of Columbia.

Congress' failure to place any jurisdictional prohibition among the general federal habeas corpus statutes is but one more link in a chain that evidences Congress' lack of intention to intrude upon the traditional habeas corpus jurisdiction of the Article III courts. More than that, absent an express amendment to Title 28, the government is forced to ask this Court to imply an amendment, despite the lack of congressional intent to accomplish such as change. Since there is no express repeal of the Article III courts' habeas jurisdiction in the United States Code, the government is left with arguing that this Court is faced with two congressional enactments – the general habeas corpus statute, 28 U.S.C. §2241, and the local post-conviction remedy statute, 23 D.C. Code §110 – one of which partially repeals the other by implication.

However, "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The exhaustion interpretation given to 23 D.C. Code §110 by the Court of Appeals demonstrates that these two statutes can

coexist. Courts particularly disfavor implied repeals of the sort urged by the government because where the intention of Congress to repeal is not absolutely clear, the court may be drawn into resolving statutory conflicts that are more apparent than real, and Congress' actual intention may ultimately be defeated. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549 (1972); *Jones v. Mayer Co.*, 392 U.S. 409, 437 (1968); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

The implied repealer argued for by the government is no mere technical change. It would take away the jurisdiction of the Article III courts to hear habeas corpus petitions for one of the classes of persons confined by the United States government – persons convicted in the local District of Columbia courts. That jurisdiction has been continuous and undisturbed since 1789.[33] As this Court said in *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975):

> As we had occasion recently to repeat, "repeals by implication are disfavored," and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-36 (1974).

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[33]The jurisdiction of the inferior Article III courts to hear habeas corpus petitions filed by persons "in custody under or by color of authority of the United States" came into our law as part of Section 14 of the Federal Judiciary Act of 1789, 1 Stat. 73, 82, and has survived repeated recodification intact as 28 U.S.C. §2241(c)(1). Mr. Pressley is in custody by authority of the United States. See footnote 24, *supra*.

Mr. Pressley suggests that the Court of Appeals' interpretation achieves the goal that this Court articulated in another context in *Ozawa v. United States*, 260 U.S. 178, 194 (1922):

> It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. (Citations omitted.) We are asked to conclude that Congress, without consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change, nevertheless, by failing to alter the identifying words (of the statute in question), which section we may assume was continued for some serious purpose, has radically modified a statute always theretofore maintained and considered as of great importance. It is inconceivable that a rule in force from the beginning of the government – a part of our history as well as our law, welded into the structure of our national policy, by a century of legislative and administrative acts and judicial decisions – would have been deprived of its force in such dubious and casual fashion.[34]

Seen in this light, it is clear that the government has distorted the significance of the fact that the words of 23 D.C. Code §110 are borrowed from the general remedy-by-motion section that applies to all persons convicted in the Article III courts, 28 U.S.C. §2255.

[34] *See Panama R.R. Co. v. Johnson*, 264 U.S. 375, 384 (1924).

Pet. Br. 42-46. While it cannot be doubted that words of the two statutes are largely the same, it does not follow that their purposes must be the same. Dealing with like words used in different parts of the same statute, this Court said in *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932):

> Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning may well vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed. (Citations omitted.)

What this Court said about identical language used in different parts of the same act should apply here *a fortiori* to similar language used in two different enactments.

When the language the Congress used in 28 U.S.C. §2255 and in 23 D.C. Code §110 is examined in the two differing contexts in which it was used, the government's insistence on mechanical adherence to literalism fails for two reasons: first, because the purpose of Section 2255 is irrelevant to the District of Columbia; and second, because the legislative history

shows that the purpose of Section 110 was quite different from that of Section 2255. A closer, more thorough, look at Section 110 shows that its proper purpose is much more like Section 2254, which governs the relations between state and federal courts on habeas, than Section 2255.

The purpose of Section 2255 was reviewed extensively in *United States v. Hayman*, 342 U.S. 205 (1952). Before 1948, the sole method of collateral attack upon federal criminal convictions in the Article III courts was by habeas corpus under 28 U.S.C. §2241. Under traditional law, habeas corpus had to be brought in the district where the prisoner was confined. *Ahrens v. Clark*, 335 U.S. 188 (1948). This had led to a disproportionate case load in some federal district courts. The five districts in which the large federal prisons were located were swamped with habeas corpus cases while the seventy-nine other districts had almost none. The case load was thus distributed without regard for the size and capacity of the various district courts, and habeas cases, which were generally nothing more than collateral attacks on convictions, were often heard in districts located thousands of miles from the place of the trial. Speck, *Statistics in Federal Habeas Corpus*, 10 Ohio St.L.J. 337 (1949).

To rectify these anomalies, Congress enacted 28 U.S.C. §2255. The new statute eliminated the right of federal prisoners to challenge their convictions in the districts where they were confined and replaced that right with a procedure by which prisoners were required to collaterally attack their convictions by motion in the courts in which they had been convicted. By this means, Congress redistributed the habeas corpus business of the Article III courts and ensured that the

various district courts disposed of collateral attacks in proportion to the number of convictions that they produced. *See United States v. Hayman*, 342 U.S. 205, 213-19 (1952); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 174-75 (1948).

The problem of skewed distribution of post-conviction cases was not posed in the District of Columbia. Section 2255 already operates to ensure that the District Court handles all the post-conviction work generated by criminal convictions in that court. As to cases coming from the local courts, the habeas corpus burden would be entirely analogous to the burden in other District courts imposed by writs filed by state prisoners. Thus, though language similar to that in Section 2255 was used, the purpose of Section 110 was different. When one examines the legislative history of Section 110, discussed above, one observes that Congress' purpose was affirmatively stated to be the codification of the Superior Court's jurisdiction over a motion collaterally attacking a conviction. Such a motion had previously existed only by virtue of the inherent common law power of the local courts in the District of Columbia. Thus, the whole of Section 110 is properly seen as a codification of a simplified alternative to traditional habeas corpus.[34a]

[34a] The remedy by motion is simpler and more expedient than the habeas corpus procedure, which begins with the establishment of a separate civil case founded upon service of process. The steps in a habeas case—petition, response, rule to show cause, return, traverse, hearing and issuance of writ—are considerably more complex than the simple 2255-type motion made in the context of the underlying criminal case. Thus 23 D.C. Code §110 has a purpose quite separate and distinct from the new local habeas corpus statute. 16 D.C. Code §§1901 *et seq.*

When Subsection 110(g) in particular is seen against the backdrop of Congress' repeatedly expressed intention to create two parallel court systems akin to the state and federal courts within each state, then its purpose too becomes clear. Since there is no separate legislative history for Subsection 110(g), a reasonable place to look for its meaning is to the comparable statute that governs the relations between the state and federal courts outside the District of Columbia. That statute is 28 U.S.C. §2254. Subsections 2254(b) and (c) require exhaustion of state remedies before resort to the Article III courts for ultimate constitutional adjudication. *Brown v. Allen,* 344 U.S. 443, 450 (1953). The Court of Appeals found 23 D.C. Code §110(g) embodied the same requirement in the District of Columbia: local court remedies must be exhausted before resort may be had to a writ of habeas corpus in the Article III courts. 515 F.2d at 1313. In doing so, the Court of Appeals did not content itself with a superficial reference to where Congress found the words it used.[35] Instead, the court looked at the purposes of Subsection 110(g) in order to ascertain how it fit into Section 110 and the Act as a whole.

[35]Though not mentioned in the government's brief, there are several subsections of 23 D.C. Code §110 that the government would presumably be prepared to admit cannot be read literally. See footnotes 62 and 65, *infra.* There are also some implications of a literal reading of Subsection 110(g) that the government would presumably be reluctant to espouse. See footnote 65, *infra.* The logical force of a rule of interpretation that, like literalism, can only be applied selectively to certain subparts and certain parts of subparts, all without apparent pattern, is dubious.

C. This Court Has Always Interpreted Statutes That Arguably Cut Back On Habeas Corpus In The Article III Courts So As To Protect The Traditional Habeas Corpus Jurisdiction Of The Article III Courts.

In the past in a series of cases, the government has argued to this Court that statutes referring to collateral attack in non-Article III courts operated to the exclusion of habeas corpus in the Article III courts. In all of those cases, this Court has found that the questioned statutes required no more than exhaustion of non-Article III remedies before resort to habeas corpus in the Article III courts would be allowed. The Court has reached this result because it did not find that Congress intended the language it had used to intrude into the as-yet uncharted area of the Suspension Clause of the Constitution.[36]

The case that is most closely analogous to the present case is *Brown v. Allen,* 344 U.S. 443 (1953). The statutory backdrop of the *Brown* case was quite similar to the case now before the Court. In 1948, Congress had passed 28 U.S.C. §2254(c), which read

[36]"The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it." *U.S. Const.* art. I, §9, cl. 2. Because this Court has never felt itself faced with a direct restriction on the writ of habeas corpus, the precise parameters of the "privilege" protected by the Suspension Clause have never been defined. "The suspension clause, so simple in appearance, is fraught with confusion. Those few cases which have dealt with it provide little interpretative guidance; commentators have largely ignored it. Consequently, conclusions in this area must be tentative." Note, *Developments in the Law–Federal Habeas Corpus,* 83 Harv. L. Rev. 1038, 1263 (1970).

literally would have closed the doors of the inferior Article III courts to any state prisoner who had any form of remedy still available to him in the state courts. The language in question in 28 U.S.C. §2254(c) was:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the state to raise, *by any available procedure*, the question presented. (Emphasis added.)

These words appeared to mean that in any state that allowed successive habeas corpus filings, and many states did, the federal courts were permanently closed to state prisoners because their state remedies were "inexhaustible."[37]

All nine justices of the *Brown* Court, badly divided as they were on the other procedural issues and on the merits, agreed that Section 2254(c) would not be construed to close the Article III courts to habeas petitioners whose state remedies were inexhaustible. Mr. Justice Reed, writing for the entire court on this point, found that there was no legislative history explaining why Congress had passed the particular subsection in

[37]There was evidence that the authors of this language intended it to have the effect of foreclosing federal habeas corpus to large numbers of state prisoners. The Honorable John J. Parker, Chief Judge of the Fourth Circuit and Chairman of the Judicial Conference Committee that drafted the language, had written an article saying that restriction of access to the federal courts was exactly the purpose of this section. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 176 (1949). The *Brown* opinion acknowledged the intentions of the authors by quoting Judge Parker at 344 U.S. at 448, n. 3. After quoting Judge Parker, the footnote continues "we do not so construe §2254. We do not believe Congress intended to require repetitious applications to state courts."

question, 28 U.S.C. §2254(c).[38] He then turned to the Act as a whole and concluded that a literal reading of Section 2254(c) would put that subsection out of harmony with the rest of the Act. He concluded:

> We are unwilling to conclude without a definite congressional direction that so radical a change was intended. 344 U.S. at 450.[39]

That is the rule that Mr. Pressley invokes in his case. He asks this Court not to find an unprecedented restriction of the right to federal habeas corpus in a statute that would achieve that restriction by a curiously indirect route where Congress demonstrated no such purpose.

In the *Brown* case, this Court did what it had done several times before in American legal history: it avoided the Suspension Clause question by construing a statute that arguably restricted access to the Article III courts on a writ of habeas corpus so that the statute required nothing more than exhaustion of non-Article III remedies. For instance, in *Gusik v. Schilder*, 340 U.S. 128 (1950), the Court was faced with a statute very much like 23 D.C. Code §110. In the *Gusik* case, Congress had legislated for the military courts, which like the new local District of Columbia courts, were

[38]Contrast the legislative history of 23 D.C. Code §110, which affirmatively indicates a purpose to codify the common law power of the local District of Columbia courts to entertain collateral attack. *See* Part I(A) of this brief, *supra*.

[39]28 U.S.C. §2254(c) remains in the code today, but continues to be interpreted to require that a state is entitled to no more than one "full opportunity to determine the federal constitutional issues before resort . . . to a federal forum." *Francisco v. Gathright*, 419 U.S. 59, 63 (1974).

created pursuant to Congress' Article I powers. *U.S. Const.* art. I, §8, cl. 14. The statute at issue in *Gusik* created a right to post-conviction collateral attack within the military justice system and provided that such collateral proceedings were "final and conclusive" and "binding upon *all* departments, *courts*, agencies, and officers *of the United States.*[40]" (Emphasis added.)

Since a very early date, final judgments of the Article I military courts had been reviewable by habeas corpus in the Article III courts. *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1805);[41] Ex parte *Reed*, 100 U.S. 13 (1879); *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Toth v. Quarles*, 350 U.S. 11 (1955).[42] But the petitioner in the *Gusik* case argued that the statute was an unconstitutional suspension of the writ because it cut off habeas review in the Article III courts since as "courts of the United States," they would be bound by the disposition made by the Article I military courts. The *Gusik* court declined this invitation to needless

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[40]62 Stat. 639; then codified as 10 U.S.C. §1525; now substantially contained in 10 U.S.C. §873.

[41]The form of the action was trespass, but the concept was clearly habeas corpus. Ex parte *Watkins*, 28 U.S. (3 Pet.) 193, 208-9 (1829); *McClaughry v. Deming*, 186 U.S. 49, 68-69 (1902).

[42]Both the *O'Callahan* and *Toth* cases were cited by this Court in *Palmore v. United States*, 411 U.S. 389, 404 (1973), for the proposition that cases involving violations of United States statutes can constitutionally be tried in Article I courts. For the purposes of the present case, *O'Callahan* and *Toth*, which are both habeas corpus cases, demonstrate the role of the Article III courts as the ultimate arbiters of federal constitutional questions that arise in the course of criminal trials in Article I courts.

constitutional adjudication and held instead: "We read the finality clause of [10 U.S.C. §1525] as doing nothing more than describing the terminal point for proceedings within the court-martial system." 340 U.S. at 132. In short, the *Gusik* Court read that statute as an exhaustion statute just as the Court of Appeals read 23 D.C. Code §110 in Mr. Pressley's case.[43]

The Court's reasoning in *Gusik* stood on the ground that in the statute there at issue Congress had been legislating for the courts-martial, not the Article III courts. The same, of course, is true of the Court Reorganization Act, which regulates the local courts, not the national courts. Pointing to the traditional habeas jurisdiction of the Article III courts to review the judgments of the Article I courts-martial, the *Gusik* court concluded:

> If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable. 340 U.S. at 132-33. (Footnote omitted.)

Mr. Pressley submits to this Court that, measured by that standard, Congress has not evidenced a "plain and unmistakeable" purpose to break with two hundred years of history during which Article III habeas corpus has been available to persons convicted in the District of Columbia courts.

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[43]Subsequent codifications of the *Gusik* statute continue to be interpreted as requiring no more than exhaustion of military court remedies as a prerequisite to Article III habeas corpus. *United States v. Augenblick*, 393 U.S. 348 (1969).

Another example of how this Court has chosen to read statutes that might bar access to Article III habeas corpus can be traced out from the turgid history of the immigration statutes. In the early history of the United States, there were virtually no laws governing immigration. However, beginning in 1875, immigration to this country was increasingly restricted by statute. This trend culminated in the Chinese Exclusion Act of 1882.[44]

In the case of *United States v. Jung Ah Lung*, 124 U.S. 631 (1888), this Court was faced with a claim that the Chinese Exclusion Act was intended to restrict the habeas corpus jurisdiction of the district court. The Act stated clearly that decisions concerning the status of immigrants were to be made by the collector of the port. The statute contained no reference to any judicial review. This, it was argued, amounted to a repeal of the federal courts' traditional habeas corpus jurisdiction. But the Court brushed this suggestion aside saying:

> But we regard this as only a provision for specifying the executive officer who is to perform the duties prescribed, and that no inference can be drawn from that or any other language in the Acts that any judicial cognizance which would otherwise exist is intended to be interfered with. 124 U.S. at 632.

[44]Act of May 6, 1882, ch. 126, 22 Stat. 58.

Five years later the Court was faced with two statutes that were even more definite.[45] These two statutes could have been read to bar intervention by the Article III courts where a person was detained by the immigration authorities. But in The Japanese Immigrant Case (*Yamataya v. Fisher*), 189 U.S. 86 (1903), the Court held that habeas corpus was an implied exception to both statutes. In justification of its reading of the statutes, this Court said:

> This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute,

[45]The first provided:

> All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury. 26 Stat. 1085.

The second statute was as follows:

> In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decisions of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury. 28 Stat. 372, 390.

arbitrary power implied in the contention of the appellant. 189 U.S. at 100.[46]

The immigration cases, together with *Brown* and *Gusik*, show that this Court has declined to interpret any statute so that it would interfere with the traditional jurisdiction of the Article III courts to test the legality of detentions by habeas corpus. Mr. Pressley urges this court to do no less when interpreting 23 D.C. Code §110(g).[47]

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[46]*Chin Yow v. United States*, 208 U.S. 8 (1908) (Holmes, J.) is to the same effect. There the Court admitted that the determination to be made by the executive officers under those statutes was meant to be the exclusive mode of settling the rights of the immigrant. Nevertheless, confronting the claim of an immigrant who claimed to have been denied an adequate hearing, the Court said:

> The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation on the one side and the conclusiveness of the Commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. 208 U.S. at 12.

The development of the law in this area was not in a straight line. *See* The Chinese Exclusion Case (*Chae Chan Ping v. United States*), 130 U.S. 581 (1889); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895). But ultimately *Yamataya, supra*, and *Chin Yow, supra*, settled the question in favor of Article III habeas corpus and the result was codified in 1956 as 8 U.S.C. §1105(a).

[47]*See also Sanders v. United States*, 373 U.S. 1 (1963), where the Court declined to read the words of 28 U.S.C. §2255 literally because to do so would be to "derogate from the traditional liberality of the writ of habeas corpus" thereby raising

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II.

IF THIS COURT WERE TO CONCLUDE THAT CONGRESS DID INTEND 23 D.C. CODE §110 TO BE A SUBSTITUTE FOR THE TRADITIONAL FEDERAL HABEAS CORPUS REMEDY OF PERSONS CONFINED BY THE UNITED STATES, THE STATUTE WOULD BE AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT BECAUSE IT SUBSTITUTES A REMEDY THAT IS NOT "EXACTLY COMMENSURATE" WITH HABEAS CORPUS IN THE ARTICLE III COURTS.

The government argues that Congress intended the remedy provided by 23 D.C. Code §110 to be a complete substitute for the privilege of the writ of habeas corpus that prisoners of the non-Article III District of Columbia courts had always enjoyed previously. Mr. Pressley has argued in Part I that Congress never had any such intention. But if this Court should find that 23 D.C. Code §110 in fact does

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"the gravest constitutional doubts." *Also United States v. Hayman*, 342 U.S. 205 (1952), reading into 28 U.S.C. §2255 the prisoner's right to be present at his post-conviction motion hearing in order to avoid any constitutional problem that would have been raised by cutting back on the traditional right of a habeas petitioner to be present at his hearing. These two cases are discussed more fully in Part II of this brief, *infra*. The government suggests that this Court ought to read statutes only so as to avoid plainly unconstitutional results. Pet. Br. 31-32. But the rule is that "(a) statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score." *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

have the effect the government argues for, then Mr. Pressley maintains that the statute unconstitutionally suspends the writ of habeas corpus, which has always been available to persons in the custody of the United States. The substitution is unconstitutional because the remedy provided is not "exactly commensurate" with the right taken away.

This Court has never found itself confronted with a statute that substituted a remedy in a non-Article III forum for habeas corpus in the Article III courts. As a result, there are no decided cases that settle the question whether Mr. Pressley has a right to be heard in the Article III courts. But Mr. Pressley argues that persons like himself who are confined by the authority of the United States have an absolute right to ultimate adjudication of their federal constitutional claims in the Article III courts, and that this right is protected by the Suspension Clause of the Constitution.

From the beginnings of our government to today, when a person has been deprived of his liberty by the power of the United States, the Article III courts have always been available to test the constitutionality of that confinement, whether the confinement was ordered by an Article III or a non-Article III authority. In Anglo-American jurisprudence, due process of law is the *sine qua non* of deprivation of liberty. Habeas corpus, which searches out the lack of due process, is therefore co-terminus with the government's power to confine.

Mr. Pressley recognizes that this Court has held that substitutes for habeas corpus are constitutionally permissible. The test for determining what amounts to a constitutionally acceptable substitute under the Suspension Clause is whether the substituted remedy is "exactly commensurate" with the remedy traditionally

available by way of federal habeas corpus. Since the only substitute for habeas corpus approved by this Court to date–the remedy by motion provided in 28 U.S.C. §2255–was itself a remedy in an Article III court, this Court has not specifically decided the question whether a substituted remedy in a court created pursuant to Article I can constitutionally replace the traditional habeas corpus remedy, which is, and has always been, in the Article III courts.

Mr. Pressley submits that the new local Article I courts in the District of Columbia are fundamentally different from the federal Article III courts. The salary and life tenure of the Article III judges are constitutionally protected, guaranteeing those judges a degree of independence that is unique. On the other hand, Congress, exercising its Article I powers, did not extend salary and tenure protections to the judges of the new courts in the District of Columbia and those judges are therefore more responsive to the parochial concerns of their locality.

The difference between a court manned by judges whose independence is protected by the Constitution and a court whose judges are more dependent on the popular will is fundamental. Mr. Pressley therefore argues that any substitute remedy in the Article I courts would not be "exactly commensurate" with his traditional habeas corpus remedy in the Article III courts and, accordingly, would be an unconstitutional suspension of the writ of habeas corpus.

A. The Suspension Clause Enjoins Congress to Extend the Privilege of the Writ of Habeas Corpus to All Persons Confined by Authority of the United States.

Mr. Pressley was confined by the authority of the United States. He was prosecuted in the name of the United States by the United States Attorney for a crime defined by an act of Congress in courts created by Congress and sentenced to the custody of the Attorney General of the United States.[48]

The first Congress of the United States empowered the inferior Article III courts to inquire into the legality of the detention of every person who was "in custody under or by color of authority of the United States." Section 14, Federal Judiciary Act of 1789, 1 Stat. 73, 82. Those words, which have survived every intervening recodification and appear verbatim in 28 U.S.C. §2241(c)(1), have been re-enforced by nearly two hundred years of legal history.

The first Congress, which included many of the framers of the Constitution, was legislating in light of its view of what the Suspension Clause required. As Mr. Chief Justice Marshal said in Ex parte *Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807):

> for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ of any of the courts of the United States, must be given by written law. . . .

[48]The nature of his confinement is not changed by the fact that the petitioner is an employee of the District of Columbia. The District of Columbia government is a creature of the United States Constitution, *U.S. Const.* art. I, §8, cl. 17, and possesses only those powers granted to it by Congress.

> It may be worthy of remark, that [the Federal Judiciary Act of 1789] was passed by the first Congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it."
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> Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.[49] 8 U.S. at 95.

[49]Chief Justice Marshall's point was repeated by this Court 156 years later in *Jones v. Cunningham*, 371 U.S. 236, 238 (1963):

> The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available. (Footnote omitted.)

See also Ex parte *Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869); *United States* ex rel. *Turner v. Williams*, 194 U.S. 279, 295 (1904) (Brewer, J., concurring); *McNally v. Hill*, 293 U.S. 131, 135 (1934). Apart from the habeas corpus jurisdiction, in other cases concerning the lower federal courts and the appellate powers of the Supreme Court, Congress has power to modify the jurisdictional framework, *Whitney v. Dick*, 202 U.S. 132 (1906); Ex parte *McCardle*, 74 U.S. (7 Wall.) 506 (1869), but it must do so consistent with the Constitution. Hart & Wechsler, *The Federal Courts and the Federal System*, 317-40, particularly 335-40 (1953 3d ed.). The possibility that Congress might refuse to create any lower federal courts at all under Article III is irrelevant to the question before this Court. The question here is, "Having created lower federal Article III courts, can Congress divest them of their habeas corpus jurisdiction?" One scholar has

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The habeas corpus power of the Article III courts, which was established by the first Congress, acting under the constitutional obligation imposed by the Suspension Clause, has not been disturbed by any subsequent congress.[50]

Over the years, the phrase "by authority of the United States" has continually been interpreted so that the habeas corpus power of the inferior Article III courts reaches not only those prisoners confined by the Article III courts themselves, but also persons confined by all other manifestations of the power of the United States, including:

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answered the question this way: "There must, to be sure, be courts legislatively created before the writ of habeas corpus can be employed. But having established Federal courts Congress would be powerless to deny the privilege of the writ. Otherwise Article I, section 9 would be reduced to a dead letter. The Constitution does not merely prohibit suspension of habeas corpus acts, or of the writ, but of "the privilege of the writ," a privilege long antedating the codification and reforms embodied in English statutes of the seventeenth century. . . ." Brief of Paul A. Freund, Assigned Counsel for Respondent, *United States v. Hayman*, 342 U.S. 205 (No. 23, October Term, 1951), p. 29. Professor Freund's brief has itself become an authority on the subject, having been cited in *Fay v. Noia*, 372 U.S. 391, 404, n. 13, 405 n. 15 (1963); *Sanders v. United States*, 373 U.S. 1, 13 n. 7 (1963); and Note, *Developments in the Law–Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1269 n. 42 (1970).

[50]This case does not present the issue of whether persons held other than by the authority of the United States also have a right of access to Article III habeas corpus that is protected by the Suspension Clause.

1) *Military Prisoners.* The writ is available in the Article III courts to military court defendants, *Burns v. Wilson*, 346 U.S. 137 (1953); persons inducted into the armed forces, *Oestereich v. Selective Service*, 393 U.S. 233, 235 (1968); and reservists ordered to active duty, *Linsalata v. Clifford*, 290 F.Supp. 338 (S.D.N.Y. 1968).[51]

2) *Immigration and Naturalization Detainees.* The writ in the Article III courts reaches not only citizens but also aliens about to be deported, *Ng Fung Ho v. White*, 259 U.S. 276 (1922), and aliens seeking entry into this country. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).

3) *Indian tribal court prisoners. Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965).[52]

4) *Persons committed to federal mental hospitals. Stewart v. Overholser*, 87 U.S. App. D.C. 402, 186 F.2d 339 (1950).

5) *Persons subject to interstate extradition proceedings.* Prisoners held by virtue of Article IV, §2, cl. 2 of the United States Constitution, no matter in what court, may be heard in the Article III courts on habeas corpus. *Roberts v. Reilly*, 116 U.S. 80 (1885).

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[51]Nationals of hostile countries seized in time of war who are detained outside the United States by force of international law are not entitled to Article III habeas corpus. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[52]This particular jurisdiction is now separately codified. 25 U.S.C. §1303.

6) *Persons confined on account of contempt of Congress. Jurney v. McCracken*, 294 U.S. 125 (1935).[53]

[53]Before the Court Reorganization Act, persons tried and convicted in the non-Article III courts in the District of Columbia could resort to the Article III courts on habeas corpus. *O'Beirne v. Overholser*, 109 U.S. App. D.C. 279, 287 F.2d 133 (1960) (Defendant tried in General Sessions and found not guilty by reason of insanity). In *Palmore v. United States*, 411 U.S. 389 (1973), this Court re-emphasized the necessity of an Article III court being available in the District of Columbia—not for criminal trials, but for "constitutional and statutory matters of general concern," a phrase that includes local prisoners' federal constitutional rights. Palmore had argued to the Court that *O'Donoghue v. United States*, 289 U.S. 516 (1933), compelled the conclusion that Article III courts were indispensable for the trial of felonies in the District of Columbia. 411 U.S. at 406. In *O'Donoghue*, this Court had examined the old District of Columbia Supreme Court and concluded that it was an Article III court whose judges' salaries could not be diminished. Mr. Justice White, writing for eight justices in *Palmore*, responded to Palmore's argument *inter alia* as follows:

> We cannot agree that *O'Donoghue* governs this case. The District of Columbia Courts there involved . . . were the only courts within the District in which District inhabitants could exercise their "right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. III." (Quoted from *O'Donoghue*, 289 U.S. at 540.)
>
> The case before us is a far cry from *O'Donoghue*. Here Congress has expressly created two systems of courts in the District. One of them is made up of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, which are constitutional courts manned by Article III judges to which the citizens of the District must or may resort for consideration of those constitutional and statutory matters of general concern which so moved the Court in *O'Donoghue*. 411 U.S. at 405-407. [Footnotes omitted.]

(continued)

The extended reach given the writ by the decisions of this and other federal courts is consistent with the very nature of habeas corpus. It is unique in the

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Prisoners of the territorial courts are also held by authority of the United States. However, the role of the Suspension Clause in the territories is somewhat uncertain. There are two classes of territories—incorporated and unincorporated—the former being those destined for statehood. The distinction turns upon the intention of Congress. Except for certain fundamental aspects of personal liberty, the Constitution does not apply *ex proprio vigore* in the unincorporated territories. *Insular Cases*, 182 U.S. 1 (1901). The Suspension Clause, which deals with a legal form peculiar to our Anglo-Saxon jurisprudence, probably does not apply in the unincorporated territories. The question does not appear to have been decided. However, the writ has consistently been extended to the unincorporated territories by legislative or executive grace. *E.g.*, 48 U.S.C. §§1421b (Guam), 1406g (Virgin Islands). *See also* Art. I, §7 of the Revised Constitution of American Samoa, ratified by the Secretary of the Interior pursuant to Executive Order No. 10264. If the writ extends to the unincorporated territories as a matter of grace, and not by constitutional compulsion under the Suspension Clause, then there need not be ultimate access as a matter of right to the Article III courts. The government points out that at present, 28 U.S.C. §2255 places the post-conviction relief in the territories in their Article I courts. Pet. Br. 61 n. 31. But there are no incorporated territories at this time. Alaska and Hawaii, the two last incorporated territories, were admitted to statehood in 1959. Before 1959 in Alaska, Hawaii, and several other incorporated territories, there were no Article III courts. For instance, the United States District Court in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), was a non-Article III District Court. But from the Northwest Ordinance of 1787 up to the more recent organic acts, there has always been provided some sort of access as a matter of right to the Article III courts. In the earlier acts, this access was by writ of error to this Court. In the later acts, it was by appeal to the circuit courts of appeals, as in the cases of

(continued)

constitutional scheme. It is the only power presumed to be inherent in the federal government without constitutional grant. The Suspension Clause does not grant the power of issuing the writ but protects against interference with a privilege that is assumed to exist. Indeed some of the authors of the Constitution thought that the most effective way to protect the writ was simply not to mention it at all. Silence, they thought, would make it clear that the government had no power to interfere with it.[54]

The constitutional assumption that habeas corpus exists and needs only to be protected from suspension is appropriate. Habeas corpus is a power which inheres in the existence of common law courts and in the guarantee of due process of law. Once the concept of

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Hawaii and Alaska. The government suggests that access to an Article III appellate court is not the same as having an Article III trial court available for habeas corpus. Pet. Br. 61, n. 31. The difference between an appellate court and a trial court for habeas corpus was minimal before this Court decided *Townsend v. Sain*, 372 U.S. 293 (1963), providing for fact-finding hearings in habeas corpus cases. Of course, the two last incorporated territories had been admitted to statehood in 1959. Whatever the case may be in the unincorporated territories alluded to by the government, it is clear that the Constitution applies fully in the District of Columbia. *Capitol Traction Co. v. Hof*, 174 U.S. 1 (1899); *Downes v. Bidwell*, 182 U.S. 244, 261-62 (1901).

[54]*The Federalist, No. 84* at 534-536 (Lodge ed. 1908); 3 Farrand, *Records of the Federal Convention* 297-298 (1911); *United States* ex rel. *Wheeler v. Williamson*, 28 Fed. Cas. No. 16,726 at 688 (E.D. Pa. 1855); Rawle, *A View of the Constitution* 118 (2d ed. 1829); Chafee, *The Most Important Human Right in the Constitution*, 32 B.U.L. Rev. 143, 144 (1952); Collings, *Habeas Corpus for Convicts–Constitutional Right or Legislative Grace?*, 40 Calif. L. Rev. 335, 341-45 (1952).

due process exists–and it has existed in Anglo-American law since Magna Carta–then in a society that values liberty, there is no judicial function more fundamental than inquiry into the legal basis of confinement.[55] The writ has become the inevitable common law counterpoint to the government's power to confine.[56] If citizens can be confined only after due process of the law, then habeas corpus must exist to search out the lack of due process.

B. Substitutes for Federal Habeas Corpus Are Permissible But Only When the Substituted Remedy Is "Exactly Commensurate" With the Traditional Habeas Corpus Remedy.

This Court has approved a remedy substituted for the traditional habeas corpus remedy in the Article III courts. That substitute is 28 U.S.C. §2255, which provides a remedy by motion in the same Article III court in which the prisoner was convicted.[57] Different

[55]With characteristic hyperbole, Dr. Johnson told Boswell: "The *Habeas Corpus* is the single advantage our government has over that of other countries." Boswell, *Life of Johnson* 382 (3d ed. 1799). Blackstone said that the act of Parliament guaranteeing habeas corpus "is frequently considered as another Magna Carta." 3 Bl. Com. 135. In the United States, the writ has been held to be equally valuable. *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961); *Bowen v. Johnston*, 306 U.S. 19, 26 (1939); *Brown v. Allen*, 344 U.S. 443, 554 (1953) (Black, J., dissenting.)

[56]*Ng Fung Ho v. White*, 259 U.S. 276 (1922) (Brandeis, J.).

[57]Mr. Pressley is aware that in the territories, the Section 2255 remedy by motion is in an Article I court. However, since the Suspension Clause applies in the current unincorporated territories only by legislative grace, the legislature is free to subtract from the protections that it chooses to extend. See footnote, 53 *supra*.

aspects of the Section 2255 remedy have been examined repeatedly by this Court.

From the cases in which this Court has examined Section 2255, a constitutional test has emerged. In order to avoid possible conflict with the Suspension Clause, Section 2255 must be read so as to provide a prisoner with the same full range of rights on his motion that he would have had on his traditional petition for habeas corpus. Any provision that appears to make the Section 2255 motion less than "exactly commensurate" with traditional federal habeas corpus must be read so as to guarantee the prisoner the full remedy previously available in order to avoid engendering serious constitutional doubts.

The words "exactly commensurate" first appeared in the case of *Hill v. United States*, 368 U.S. 424 (1962).[58] The *Hill* court summarized the history of 28 U.S.C. §2255 and the first Supreme Court opinion dealing with the statute, *United States v. Hayman*, 342 U.S. 205 (1952), as follows:

> ...it conclusively appears from the historic context in which §2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which has previously been available by

[58]The *Hill* case illustrates the proposition that while the Suspension Clause defines the minimum that Section 2255 must encompass (*i.e.*, no less than habeas corpus), as a matter of statutory interpretation, this Court has found that Congress intended Section 2255 to encompass no more than traditional habeas corpus had. Hill had been denied his opportunity to allocute at the time of sentence. Since habeas corpus would not have been available to attack this procedural error, Section 2255 was held to afford Hill no greater remedy. *See Heflin v. United States*, 358 U.S. 415 (1959).

> habeas corpus in the court of the district where the prisoner was confined. 368 U.S. at 427.

In the *Hayman* case,[59] the first Section 2255 case to reach this Court, the Ninth Circuit had declared 28 U.S.C. §2255 to be an unconstitutional suspension of the writ of habeas corpus. *Hayman v. United States*, 187 F.2d 456 (9th Cir. 1951).[60] This Court appointed Professor Paul A. Freund to represent Hayman and was presented with a thorough brief arguing that Congress was powerless to tamper with habeas corpus on account of the Suspension Clause.[61] However, the *Hayman* Court found it unnecessary to confront the knotty constitutional issues that Professor Freund had briefed. The Court found that Congress had not intended any diminution of a federal prisoner's right to attack his conviction collaterally. After an exhaustive review of the practical problems caused by federal prisoners filing their writs where they were confined and of the legislative history, 342 U.S. at 214-19, the *Hayman* Court found that:

[59]The background of Section 2255 and the *Hayman* case are more fully discussed in Part I(C), *supra*.

[60]Hayman, who was incarcerated outside the district in which he had been convicted, was not brought into court for the hearing that was held on his Section 2255 motion. He claimed that since the right to be present would have extended to a similar hearing on a petition for habeas corpus, it was an unconstitutional suspension of the writ to deny him this right under 28 U.S.C. §2255. This Court agreed that Hayman had a right to be present but found that Congress had not intended to deprive him of that right when it enacted Section 2255. Since Section 2255 encompassed the right to be present, as well as every other substantial right implicated in traditional habeas corpus, this Court found that the writ was not suspended.

[61]See footnote 49, *supra*.

> The motion remedy broadly covers all situations where the sentence is "open to collateral attack." As a remedy, it is intended to be as broad as habeas corpus. Statement of Judicial Conference Committee on Habeas Procedure. 342 U.S. at 217.

The history of Section 2255 led this Court to the following conclusion:

> Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum. 342 U.S. at 219.

In sum, this Court held that the remedy provided by Section 2255 was exactly the same as that supplied by habeas corpus except that the location of the litigation was shifted into the Article III court where the conviction had been entered rather than the district of confinement.[62]

In a later case, *Sanders v. United States*, 373 U.S. 1 (1963), this Court reviewed both the "exactly commensurate" test of *Hill* and the constitutional background

[62]One significant implication of the decision in *Hayman* is that Subsection 110(d), which is taken almost verbatim from the fourth paragraph of Section 2255 as interpreted in *Hayman*, cannot mean what it apparently says. The government argues that Subsection 110(g) should be read literally but would presumably concede that Subsection 110(d) cannot be read literally. Mr. Pressley argues that statutes in the post-conviction attack area must be, and have been, interpreted so as to give effect to Congress' intention not to infringe on traditional habeas corpus and so as to avoid serious constitutional doubts that would otherwise arise under the Suspension Clause. See footnote 65, *infra*.

of *Hayman*. Sanders had filed a Section 2255 motion making certain summary allegations and praying that his conviction be vacated. This first motion was denied without a hearing. Sanders then filed a second motion alleging new grounds (mental incompetency at the time of his plea of guilty) for relief. The district court denied the second motion without a hearing on the grounds that no reason appeared why these allegations had not been included in the first motion. The effect of the denial by the District Court and the holding of the Ninth Circuit, which affirmed, was that the matter had become *res judicata* as a result of the ruling on the first motion.

This Court examined the language in 28 U.S.C. §2255 that appeared to bar successive motions where "similar relief" is being sought.[63] The Court recognized that the "language might seem to empower the sentencing court to apply *res judicata* virtually at will." However, the Court was quick to say: "But the language cannot be taken literally." 373 U.S. at 13. Instead this Court read the words concerning successive motions to be "the material equivalent of 28 U.S.C. §2244," the section of the general habeas corpus statutes dealing with successive petitions. 373 U.S. at 14. Section 2244, Title 28, United States Code, in turn was interpreted as not imposing by statute any doctrine of *res judicata* that did not apply to common law habeas corpus. 373 U.S. at 11-12.[64] For as this Court

[63]"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." 28 U.S.C. §2255.

[64]For the proposition that the traditional writ of habeas corpus was not subject to the doctrine of *res judicata*, the *Sanders* court relied on *Price v. Johnston*, 334 U.S. 266 (1948), and the cases cited at 373 U.S. at 7-8.

said "... if construed to derogate from the traditional liberality of the writ of habeas corpus, ... §2244 might raise serious constitutional questions." 373 U.S. at 11-12, citing the Suspension Clause and *Fay v. Noia*, 372 U.S. 391, 406 (1963).[65]

[65]The language concerning successive motions was also carried verbatim from the fifth paragraph of 28 U.S.C. §2255 into 23 D.C. Code §110(e). To paraphrase *Sanders*, "the language cannot be taken literally" there either. Once again, the government's literalism presumably only extends to the borders of Subsection 110(g) and does not carry over into Subsections 110(d) and 110(e). See footnote 62, *supra*. A number of other troublesome issues are raised by the government's "literal" reading of 23 D.C. Code §110. For instance, Section 110 appears to prohibit "any Federal court" from hearing a habeas corpus petition brought by a Superior Court prisoner to attack the legality of his conviction. Read literally, that prohibition would prevent this Court from entertaining its "original" writ on behalf of Superior Court prisoners. This would be startling since although little used in modern times on account of the present structure of the habeas corpus statutes, this Court's original writ exists, *e.g.*, *Mooney v. Holohan*, 294 U.S. 103 (1935), and is generally thought to be "unsuspendable." Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Supreme Court Rev. 153. In addition, a literal reading of 23 D.C. Code §110 that would cut off local court prisoners' access to the inferior Article III courts might place on this Court an additional responsibility to be generous with its discretionary writ of certiorari in cases coming from the local courts to resolve conflicts between those courts and the Article III courts in the District of Columbia on points of federal constitutional law. *Pernell v. Southall Realty*, 416 U.S. 363, 368 n. 4 (1974). In the states, many of those conflicts arising in criminal cases are resolved by the exercise of the federal habeas jurisdiction. Another issue raised by the government's literal reading is the role of *Younger v. Harris*, 401 U.S. 37 (1971), requiring abstention by the federal courts to allow the state judicial process to run its full course, in a system in which federal constitutional questions are not amenable to review in the

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The meaning of the words in Section 2255 dealing with successive petitions was limited to the same meaning as Section 2244, the general habeas statute, and the common law doctrine concerning *res judicata* in habeas corpus. This Court reached this result because Section 2255, like Section 2244, was constitutional only if it was exactly as broad in its terms as common law habeas corpus. This Court quoted the "exactly commensurate" test from *Hill, supra*, 368 U.S. at 427, and then adverted to the constitutional problems that would be raised by any construction of §2255 that would make it less than "exactly commensurate" with habeas corpus:

> Indeed, if [Sanders] were subject to any substantial procedural hurdles which made his remedy under §2255 less swift and imperative than federal habeas corpus, the gravest constitutional

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inferior federal courts even after the state process is completed. *Pernell v. Southall Realty, supra*, 416 U.S. 363, 368 n. 4 (1974). Finally, the language of 23 D.C. Code §110(g), read literally, would by negative implication, allow a state court to issue a writ of habeas corpus for a Superior Court prisoner whose Section 110 remedy was inadequate or ineffective. This literalism would overrule *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), and more than one hundred years of constitutional decisions under the Supremacy Clause holding that states courts cannot free a prisoner of the United States because they disagree with a federal court's interpretation of the federal Constitution. The government's brief does not undertake to explain how Congress could have intended these consequences of its literal words without giving a hint in the legislative history.

doubts would be engendered, as the Court in *Hayman* implicitly recognized. 373 U.S. at 14.

This Court's decisions in *Hayman* and *Sanders* demonstrate that the Court is constitutionally compelled to protect traditional federal habeas corpus for federal prisoners from legislative dilution.[66] While this Court has acknowledged that there can be substitutes for federal habeas corpus, those substitutes must be "exactly commensurate" with traditional habeas corpus in order to avoid running afoul of the Suspension Clause. Congress can change the name of the remedy and can choose which Article III court the prisoner must file in; it cannot constitutionally subtract from the substance of the writ of habeas corpus. Part of the substance of Mr. Pressley's right to the writ is his right to be heard in an Article III court with all that that entails in terms of salary and tenure protections and resulting judicial independence.

C. A Post-Conviction Remedy In the Local Courts Is Not "Exactly Commensurate" With the Habeas Corpus Remedy Because a Remedy in an Article I Court Is Not the Same As a Remedy in an Article III Court.

From the Declaration of Independence down to the decision in *Palmore v. United States*, 411 U.S. 389

[66]*See Davis v. United States*, 417 U.S. 333, 343 (1974), pointing out that if Section 2255 does not include every claim that could be heard on habeas corpus, then it would be under a "shadow," presumably a constitutional shadow. *See Schlesinger v. Councilman*, 420 U.S. 738, 750 (1975), for the proposition that Congress in legislating in this area has acknowledged "the special constitutional status of that writ [habeas corpus] under the Suspension Clause, a status shared by no other form of collateral relief."

(1973), all the authorities are unanimous that there is a fundamental difference between the Article III courts, which enjoy salary and tenure protections, and all other non-Article III courts.

The government seeks to minimize that fundamental difference and argues that, since the new local courts are somewhat like the Article III courts, the post-conviction remedy in those courts is close enough to "exactly commensurate" with traditional habeas corpus to slide by the constitutional test. This kind of constitutional approximation is not warranted. First, where habeas corpus is concerned, "close to commensurate" is not enough. Second, the new local courts are not really close to Article III courts in their most important aspects.

The history of the salary and tenure protections demonstrate their importance in our constitutional scheme. One of the "injuries and usurpations" with which the colonists taxed King George III in the Declaration of Independence was that: "He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries."

The colonists' complaint against King George was subsequently reinforced by their own unhappy experiment under the Articles of Confederation with a national government that had no national courts. Without national courts to enforce and protect national values, our first federal government was quickly mired in disunity and sectionalism.[67]

[67]"(T)he United States afford the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws." *The Federalist*, No. 21.

The founders of this country felt strongly that the Article III judges would have qualities that other judges would not have. The most important of these qualities was independence. The Constitution absolutely protects the Article III judges' independence through the following language in Article III, §1, of the Constitution:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The importance of these protections and the concommitant independence of Article III judges has been commented on throughout our entire legal history. Mr. Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1921), discussing the necessity of federal enforcement of federal rights, said this:

> In many states the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist. . . . How extensive may be the mischief if the first decisions in such cases should be final! 6 Wheat. at 386-387.

In *Glidden v. Zdanok*, 370 U.S. 530 (1962), the justices were deeply divided over whether the judges in question were Article I or Article III judges. But not one justice, either in the majority or in dissent, suggested that the differences between the two were unimportant or trivial.

That the distinction between Article III and non-Article III judges is still thought to be fundamentally significant is evidenced by the fact that this Court in *Palmore v. United States*, 411 U.S. 389 (1973), was at pains to point out that criminal cases in the District of Columbia can be tried in Article I courts not because there is no difference between Article I and Article III courts but because Congress was not constitutionally bound to provide an Article III court for that purpose.

> We do not discount the importance attached to the tenure and salary provisions of Article III, but we conclude that Congress was not required to provide an Article III court for the trial of criminal cases arising under its laws applicable only within the District of Columbia. 411 U.S. at 410.

One of the best summations of the past comments on the important role the salary and tenure protections are thought to play is contained in *Evans v. Gore*, 253 U.S. 245 (1920). Mr. Pressley has set forth in the Appendix of this brief an extensive excerpt from the opinion in the *Evans* case. The excerpt collects the views of authorities such as Alexander Hamilton, Chief Justice Marshall, Mr. Justice Story, Chancellor Kent, and President Woodrow Wilson on the importance of salary and tenure protections. Review of the strongly worded sentiments of these writers serves to re-emphasize the significance that commentators have attached to the independence that flows from these protections.

In the face of the weight of legal history, the government argues that since "the structure [of the new local courts] created by Congress goes far toward

providing analogous assurances to Superior Court judges," the Section 110 remedy is close enough to Article III habeas corpus to pass the "exactly commensurate" test. Pet. Br. 60. The government's argument is ill-founded, both as a matter of law and of fact.

The cases demonstrate that this Court has strictly insisted on the "exactly" in the "exactly commensurate" test for what will constitutionally substitute for habeas corpus. For example, in *Sanders v. United States*, 373 U.S. 1 (1963), discussed more fully in Part II(B), *supra*, this Court held that the *res judicata* rules of Section 2255 had to be precisely the same as they were in the traditional habeas cases in order to avoid collision with the Suspension Clause. The "exactly commensurate" test was stated very broadly there:

> Indeed, if (the prisoner) were subject to any substantial procedural hurdles which made his remedy under §2255 less swift and imperative than federal habeas corpus, then the gravest constitutional doubts would be engendered. . . . 373 U.S. at 14.

In addition, as a matter of fact, the government's argument that "assurances" that are "analogous" to the salary and tenure protections of Article III have been made to Superior Court judges is not correct. Pet. Br. 60. Article III judges serve "during good behavior" and cannot be removed except by impeachment. District of Columbia judges serve for fifteen years. 11 D.C. Code §1502. *See* District Charter, 11 (Appendix) D.C. Code §431(c) (Supp. 1975).

During their fifteen-year terms,[68] the local judges are subject to removal, suspension, censure, or involuntary

[68]New judicial appointments are made by the President, who must choose from lists of names submitted to him periodically by the newly-created District of Columbia Judicial Nomination Commission. 11 (Appendix) D.C. Code §434 (Supp. 1975).

retirement by the District of Columbia Commission on Judicial Disabilities and Tenure. The genesis of the Commission is in the political process. Its members are appointed by the President of the United States, the unified Bar, the elected City Council, and the Chief Judge of the United States District Court. 11 (Appendix) D.C. Code §§433, 434 (Supp. 1975). The criteria upon which the Tenure Commission is to act in disciplining judges are so loosely drawn as to invite subjective judgments. The Court Reorganization Act gives the following bases for disciplinary action:

> (A) willful misconduct in office;
> (B) willful and persistent failure to perform judicial duties; or
> (C) any other conduct which is prejudicial to the administration of justice or which brings the judicial office into disrepute.

11 D.C. Code §1526 (A)(2). *See also* 11 (Appendix) D.C. Code §432 (a)(2) (Supp. 1975).

At the end of their terms, the judges of the local courts are subject to evaluation as to their fitness for reappointment to the bench. This evaluation is also performed by the Tenure Commission. The Court Reorganization Act gives the Tenure Commission no guidance whatsoever on how to evaluate sitting judges for reappointment.

Into the subjective void left by the statute, extrajudicial considerations will, and already have, rushed. In the case of the very first judge considered for reappointment by the Tenure Commission, parties that were actively litigating before the judge in question took strong positions on his fitness for reappointment. The Commission was urged to take his judicial philosophy and his rate of reversal by the District of

Columbia Court of Appeals into account. *Washington Post*, Aug. 11, 1976, at A-1, col. 4; *Washington Star*, Aug. 11, 1976, at A-2, col. 1. Upcoming judicial candidates before the Commission promise even more controversy. What effect these disputes will have on the conduct of sitting judges who will in the future be candidates for reappointment can only be guessed at.

The salaries of the local judges are set by statute at ninety percent of the salaries of the United States District Court judges. 11 D.C. Code §904. Unlike the Article III judges, however, no statute or constitutional provision prohibits the diminution of the salaries of the local Article I court judges.

In short, the facts show that the new local courts are substantially different from the Article III courts in terms of tenure and salary protections, a difference that the Framers and this Court have consistently emphasized as being fundamental. Those differences mean that a post-conviction motion in the local courts is not "exactly commensurate" with a writ of habeas corpus in the Article III courts.

But none of these difficult questions of whether this statute can pass constitutional muster needs to be faced unless this Court finds that 23 D.C. Code §110 will not admit of any interpretation that does not infringe on the habeas jurisdiction of the Article III courts.[69] If as

[69]Any statute that singles out prisoners of the local District of Columbia courts from other persons held by authority of the United States and discriminates against them in terms of their access to habeas corpus in the Article III courts would raise equal protection problems. The Court of Appeals found these potential problems to be substantial. 515 F.2d at 1304-5. There is a line of cases in the District of Columbia that deals with similar statutes. *United States v. Thompson*, 147 U.S. App. D.C. *(continued)*

did the eight judge majority of the Court of Appeals, this Court construes 23 D.C. Code §110 so as to avoid a collision with the Suspension Clause, then none of these questions need be decided.

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1, 452 F.2d 1333 (1971); *United States v. Brown*, 157 U.S. App. D.C. 311, 483 F.2d 1314 (1973); *United States v. Hairston*, 161 U.S. App. D.C. 466, 495 F.2d 1046 (1974). *See also United States v. Henson*, 159 U.S. App. D.C. 32, 49 n. 20, 486 F.2d 1292 n. 20 (1973) (*en banc*). These cases have not yet found their way into this Court. And yet if this Court holds that 23 D.C. Code §110 restricts Article III habeas corpus and that the Suspension Clause is no bar to such a restriction, then the application of the constitutional holdings in these cases would also be presented for decision by this Court.

CONCLUSION

Mr. Pressley prays this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

Excerpt from *Evans v. Gore*, 253 U.S. 245 (1920):

The particular need for making the judiciary independent was elaborately pointed out by Alexander Hamilton in the Federalist, No. 78, from which we excerpt the following:

> "The executive not only dispenses the honors, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force or will, but merely judgment. . . . This simple view of the matter suggests several important consequences: It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."
>
> "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

At a later period John Marshal, whose rich experience as lawyer, legislator, and chief justice enabled him to speak as no one else could, tersely said (Debates Va. Conv., 1829-1831, pp. 616, 619):

> "Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance that, in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary."

More recently the need for this independence was illustrated by Mr. Wilson, now the President, in the following admirable statement:

> "It is also necessary that there should be a judiciary endowed with substantial and independent powers, and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the government."
>
> "Indeed, there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our

> definition of liberty is that it is the best practicable adjustment between the powers of the government and the privileges of the individual."
>
> "Our courts are the balance wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some nonpolitical forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance wheel of our entire system: it is meant to maintain the nice adjustment between individual rights and governmental powers which constitutes political liberty." Constitutional Government in the United States, pp. 17, 142.

Conscious of the nature and scope of the power being vested in the national courts, recognizing that they would be charged with responsibilities more

delicate and important than any ever before confided to judicial tribunals, and appreciating that they were to be, in the words of George Washington, "the keystone of our political fabric," the convention with unusual accord incorporated in the Constitution the provision that the judges "shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." Can there be any doubt that the two things thus coupled in place–the clause in respect of tenure during good behavior and that in respect of an undiminishable compensation–were equally coupled in purpose? And is it not plain that their purpose was to invest the judges with an independence in keeping with the delicacy and importance of their task, and with the imperative need for its impartial and fearless performance? Mr. Hamilton said in explanation and support of the provision (Federalist No. 79): "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*. . . . The enlightened friends to good government in every state have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these, indeed, have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite . . . This provision for the support of the judges bears every mark of prudence and efficacy; and

it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states in regard to their own judges." The several commentators on the Constitution have adopted and reiterated this view,–Judge Story adding: "Without this provision [as to an undiminishable compensation], the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery;" and Chancellor Kent observing: "It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station." 253 U.S. at 249-253. (footnotes omitted) (emphasis in original).